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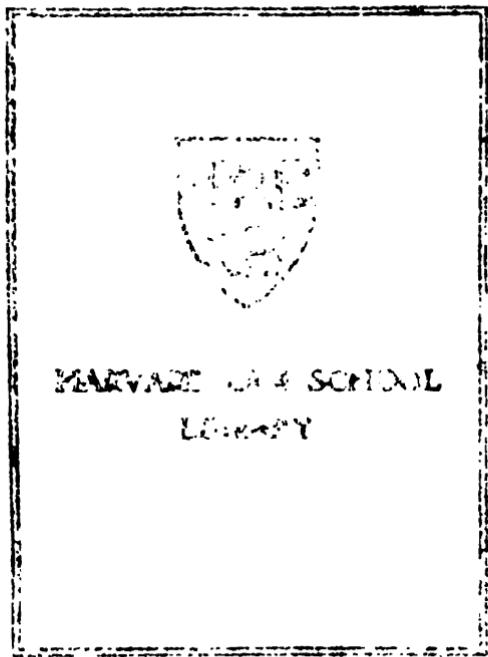
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N. B.—Cut out and stick each block on page at its head, or citations for entire volume on inside front cover.

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REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

**NORMAN L. FREEMAN,
REPORTER.**

VOLUME 122.

**CONTAINING CASES IN WHICH OPINIONS WERE FILED IN JANUARY, MAY,
JUNE, SEPTEMBER AND NOVEMBER, 1887, AND SOME CASES IN
WHICH APPLICATIONS FOR REHEARING WERE DENIED
AT THE NOVEMBER TERM, 1887, AND AT THE
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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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BENJAMIN R. SHELDON,* CHIEF JUSTICE.

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BENJAMIN R. SHELDON,
ALFRED M. CRAIG,
JOHN H. MULKEY,
JOHN M. SCOTT,
SIMEON P. SHOPE,
BENJAMIN D. MAGRUDER,

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GEORGE HUNT.

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J. O. CHANCE, Mt. Vernon.

CLERK IN THE CENTRAL GRAND DIVISION,
ETHAN A. SNIVELY, Springfield.

CLERK IN THE NORTHERN GRAND DIVISION,
ALFRED H. TAYLOR, Ottawa.

*Mr. JUSTICE SHELDON became Chief Justice at the June term, 1887.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ILLINOIS.

HEADNOTE OF

AUGUST SPIES *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa September 14, 1887.

(122 Illinois, 1)

1. MURDER *defined*—*malice presumed*. Murder is the unlawful killing of a human being in the peace of the people, with malice aforethought, either express or implied. Malice is always presumed where one person deliberately injures another. It is the *deliberation* with which the act is performed that gives it character. It is the opposite of an act performed under uncontrollable passion, which prevents all deliberation or cool reflection in forming a purpose.

2. ACCESSORY BEFORE THE FACT—*as principal*. The statute abolishes the distinction between accessories before the fact and principals; by it all accessories before the fact are made principals.

3. SAME—*how the accessory may be charged*. As the acts of the principal are made the acts of the accessory, the latter may be charged as having done the act himself, and may be indicted and punished accordingly.

4. CONSPIRACY—*defined*. A conspiracy may be described, in general terms, as a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.

5. SAME—*of the concurrence of the several members—how made to appear*. If one concur, no proof of agreement to concur is necessary. As soon as the union of wills for the unlawful purpose is perfected, the offence

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of conspiracy is complete. This joint assent of minds, like all other parts of a criminal case, may be established as an inference from the other facts proved,—in other words, by circumstantial evidence.

6. Though the common design is the essence of the charge of conspiracy, it is not necessary to prove that the alleged conspirators came together and actually agreed, in terms, to have that design and to pursue it by common means. If it be proved that they pursued by their acts the same object, often by the same means, one performing one part, another performing another part of the same, so as to complete it with a view to the attainment of that same object, the conclusion will be justified that they were engaged in a conspiracy to effect that object.

7. *SAME—what is an unlawful purpose—change of government by force.* It can not be properly assumed that "a conspiracy to bring about a change of government, by peaceful means if possible, but if necessary, to resort to force for that purpose," is not unlawful. The fact that the conspirators may not have intended to resort to force, unless, in their judgment, they should deem it necessary to do so, would not make their conspiracy any the less unlawful.

8. *SAME—not in at the inception.* It is not necessary to prove that the conspiracy originated with those who are particularly charged, or that they met during the process of its concoction; for every person entering into a conspiracy or common design, already formed, is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design.

9. *SAME—not present at the consummation.* It makes no difference in the degree of responsibility resting upon those conspiring to do an unlawful act, that some of them were not present at the consummation of the design of the conspiracy. Where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and, in the execution of their design, a murder is committed, all of the company are equally principals in the murder, though at the time of the act some of them were at such a distance as to be out of view, if the murder be in furtherance of the common design.

10. *SAME—specific malice not necessary.* In the case of a homicide, there might be no special malice against the person slain, nor deliberate intention to hurt him; but if the act was committed in the prosecution of the original purpose, which was unlawful, the whole party will be involved in the guilt of him who gave the blow.

11. *SAME—particular result not anticipated.* A person may be guilty of a wrong which he did not specifically intend, if it came naturally, or even accidentally, through some other specific or general evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one proceeding according to the common plan terminates in a criminal result, though not the particular result meant, all are liable.

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12. He who enters into a combination or conspiracy to do such an unlawful act as will probably result in the taking of human life, must be presumed to have understood the consequences which might reasonably be expected to flow from carrying it into effect, and also to have assented to the doing of whatever would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life.

13. *SAME—difference in ultimate purpose—as between those who incite and those who execute.* If men combine together as conspirators to accomplish an unlawful purpose, as, the overthrow of society and government and law, called by them a "social revolution," and seek, as a means to an end, by print and speech, to excite to tumult and riot and murder, another class of persons having a different purpose in view, as, in case of workingmen who have entered upon a "strike" with the view of bringing about a reduction of the hours of day labor, then, notwithstanding the difference in the ultimate objects desired to be attained by the respective classes of persons, the conspirators who advised and instigated the others to violence will be held responsible for murder that may result from their aid and encouragement.

14. *SAME—original plan deviated from.* A plan for the perpetration of crime, or for the accomplishment of any action whether worthy or unworthy, can not always be executed in exact accordance with the original conception. It must sometimes be changed or modified in order to meet emergencies or unforeseen contingencies.

15. If A hire B to shoot C at a designated place, on a certain night, but B, seeing C at another locality on the same night, shoots him there, A is none the less guilty of aiding, abetting, advising and encouraging the murder of C. So if there be a conspiracy to kill policemen at a station house, but the agents of the conspiracy kill the policemen a short distance away from the station house, there is no such departure from the original design as to relieve the conspirators of responsibility.

16. *SAME—specific means not appointed.* Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged.

17. *SAME—as to which of two persons caused the immediate injury.* In the case of a joint attack upon a body of persons, made by a number of other persons, with two kinds of weapons, as, pistols and bombs, in pursuance of a previously arranged conspiracy, and the murder of one of the persons attacked results, those of the attacking party who fired pistol shots only, will be equally responsible for the murder with the one throwing a bomb, although the killing was in fact done by the bomb and not by a pistol shot.

18. *SAME—inciting to violence by newspaper organs, and speeches.* He who inflames people's minds, and induces them, by violent means, to accomplish an illegal object, is himself a rioter, though he takes no part in

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the riot. One is responsible for what wrong flows directly from his corrupt intentions. If he set in motion the physical power of another, he is liable for its result. If he contemplated the result, he is answerable, though it is produced in a manner he did not contemplate. If he awakes into action an indiscriminate power, he is responsible. If he gives directions vaguely and inadvertently, and the person receiving them acts according to what he might have foreseen would be the understanding, he is responsible. It can make no difference whether the mind is affected by inflammatory words addressed to the reader through the newspaper organ of a society to which he belongs, or to the hearer through the spoken words of an orator whom he looks up to as a representative of his own peculiar class.

19. The "International Association" in Chicago was an illegal organization engaged in making bombs and drilling with arms for the unlawful purpose of attacking the police force of the city in case the latter should assume to do their duty in the preservation of the public peace. Its members were conspirators, and, by their act of conspiring together, they jointly assumed to themselves, as a body, the attribute of individuality, so far as regarded the prosecution of the common design. Newspapers, conducted by members of the organization, as its organs, advocated the purposes of the conspiracy, and speakers addressed public meetings, called by some of the conspirators, inciting the people to resist the police, and advising riot and murder. The police were attacked, and several of them killed. On a prosecution of some of the conspirators for murder, it was held, that the utterances of these papers and speakers were competent evidence against the defendants, as showing the purposes and intentions of the conspiracy which they represented.

20. SAME—*adopting the writings of others—Most's Science of Revolutionary Warfare.* On the same trial, Johann Most's book on the Science of Revolutionary Warfare, was admitted in evidence against the defendants. This book is a treatise upon the most improved methods of making bombs and preparing dynamite and other explosives, and contained suggestions as to how to apply the results of modern science to the work of destruction of the "capitalistic system," and advice to persons who, as members of the so-called revolutionary forces, might purpose to engage in the use of these weapons and explosives. The treatise was distributed among the members of the International groups at their picnics and meetings through the agency of the International Association. Its circulation was an act of the illegal organization to which all the defendants belonged, and was one of the methods by which that organization instructed and advised its members to get ready for the murder of the police during the excitement among the striking workingmen, at the time existing. Their newspaper organs commended it and quoted from it. Some of the conspirators read it and acted upon the suggestions contained in it. When the leaders of the organization thus made use of this treatise, they adopted it as a manual of tactics, and it became a book of their written advice and instructions to their followers. It was

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competent evidence as showing the purposes and objects which they had in view and the methods by which they proposed to accomplish those objects.

21. *SAME—evidence—exhibiting to jury weapons similar to those used.* The policeman for whose murder the defendants were indicted, was killed by the explosion of a bomb thrown in the midst of the police force. On the trial the court allowed to be given in evidence, bombs, and cans containing dynamite, and prepared with contrivances for exploding it, which had been found under sidewalks and buried in the ground at certain points in the city, placed there by certain of the conspirators. As specimens of the kind of weapons which Lingg, the one of the conspirators who had charge of their manufacture, and his associates, were preparing, and as showing the malice and evil heart which the intended use of such weapons indicated, the introduction of bombs made by him was not improper. The jury had a right to see them and compare their structure with the description of the bomb that killed the policeman, with a view of determining whether Lingg, as was charged, was the maker of the latter or not.

22. As to the fact that some of these bombs and cans, like some which had been shown to certain of the conspirators during their drill, were found buried near one of the designated meeting places where certain of the armed men were to assemble on the night of the attack of the police,—this was a circumstance proper to be considered by the jury in determining the nature and character of the conspiracy and its connection with the events of the night of the killing.

23. *SAME—the particular agency, or the particular victim, not known to the perpetrator.* It is not essential to the guilt of a person who has conspired with others for the commission of a crime, that in the preparation of the instrumentalities for the carrying out of the design of the conspirators, he did not know the name of the particular individual who was to use them. So where a number of persons conspired together to destroy the police force of a city, in a certain event, as, in case of a collision between them and workingmen, by throwing a bomb among the police, if the bomb-maker knew that it was to be thrown by one of those having the common purpose, that would be sufficient to affect him with the guilt of advising, encouraging, aiding or abetting the crime resulting from the act.

24. And it would be alike unimportant, in fixing the guilt of the bomb-maker, that he did not know what particular policeman might be injured or killed. The design of the conspiracy virtually designated the body or class of men who were to be attacked. Should one of such class be killed, the guilt would be the same as though a person having a particular name had been pointed out as the victim.

25. So, too, it would be immaterial that he did not know the bomb would be thrown at any particular time or place. It would be enough that he knew it was to be used at the place where the anticipated event might transpire,—the collision between the workingmen and the police.

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26. **SAME**—*identity of the person doing the particular act, sufficiently shown.* Though where, in the execution of the unlawful purpose of a conspiracy, a bomb was thrown among a body of police, for the purpose of sustaining a conviction of some of the conspirators for murder, as resulting from the throwing of the bomb, the identity of the bomb-thrower is sufficiently shown if it appeared he belonged to the conspiracy, and if he threw the bomb to carry out the conspiracy and further its designs, even though his name and personal description were not known. A person may very properly be charged with advising, encouraging, aiding and abetting an unknown principal in the perpetration of a crime.

27. **SAME**—*as to the particular person doing the act, whether known or unknown—allegations and proofs in respect thereto.* In an indictment against several for murder, some of the counts charged the defendants with having advised, encouraged, aided and abetted a particular person named, in the perpetration of the crime, and evidence was introduced to show that the particular person named *did* perpetrate the crime. Other counts charged the defendants with having advised, encouraged, aided and abetted an *unknown person* in the commission of the crime, and proof was given which tended to show that the perpetrator of the crime *was* an unknown person. In this condition of the pleadings and the proofs, it was not required of the trial court that it should so direct the jury as to restrict them to the consideration of the case on the theory that the crime was committed by the particular person named, and to omit any reference to the other theory that it was perpetrated by an unknown person.

28. Under our statute, the man who, "not being present aiding, abetting or assisting, hath advised, encouraged, aided or abetted *the perpetration of a crime*," may be considered as the *principal* in the commission of the crime, may be indicted as principal, and may be punished as such. The indictment need not say anything about his having aided and abetted either a known principal or an unknown principal. It may simply charge him with committing the crime as principal. Then, if, upon the trial, the proof shows that the person charged, aided, abetted, assisted, advised or encouraged the perpetration of the crime, the charge that he committed it as *principal* is established against him. It would make no difference whether the proof showed that he so aided and abetted a *known* or an *unknown* principal.

29. **SAME**—*consideration of the purposes and principles of the conspirators—as, that they are socialists, communists or anarchists.* If there be a conspiracy, and crime has resulted from it, it becomes material to show the purposes and objects of the conspiracy with the view of determining whether and in what respects it is unlawful. Anarchy is the absence of government; it is a state of society where there is no law or supreme power. If the conspiracy had for its object the destruction of the law and the government, and of the police and militia as the representatives of law and government, it had for its object the bringing about of practical anarchy.

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And when murder has resulted from the conspiracy, and the perpetrators are on trial for the crime, whether or not the defendants were anarchists may be a proper circumstance to be considered, in connection with other circumstances in the case, with a view of showing what connection, if any, they had with the conspiracy and what were their purposes in joining it. So it would be putting it too broadly to instruct the jury in such a case that it could not be material in the case that the defendants, or some of them, were or might be "socialists, communists, or anarchists," and such an instruction might well be refused.

30. *SAME—acts and declarations of one conspirator as the acts and declarations of all.* When the fact of a conspiracy is once established, any act of one of the conspirators in the prosecution of the enterprise, is considered the act of all. And when murder results from the act of the conspirators, individuals who, though not specifically parties to the killing, are present and consenting to the assemblage by whom it is perpetrated, are principals when the killing is in pursuance of the common design.

31. After a conspiracy has been established, only those declarations of each member, however, which are in furtherance of the common design can be introduced in evidence against the other members. Declarations that are merely narrative as to what has been done or will be done, are incompetent, and should not be admitted except as against the defendant making them, or in whose presence they were made.

32. *SAME—as to the order in which the proofs may be given, as to the existence of the conspiracy and the individual acts of its members.* Whether the acts and declarations of one of several alleged conspirators shall be allowed to be proven before proof is made of the conspiracy, or of the connection of those sought to be charged, is a matter largely discretionary with the trial judge. The proof of conspiracy which will authorize the introduction of evidence as to the acts and declarations of the co-conspirators may be such proof only as is sufficient, in the opinion of the trial judge, to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury as *tending* to establish such fact. Sometimes, for the sake of convenience, the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy, the prosecution undertaking to furnish such proof at a subsequent stage of the cause.

33. The rule that the conspiracy must be first established *prima facie* before the acts and declarations of one conspirator can be received in evidence against another, can not well be enforced where the proof of the conspiracy depends upon a vast amount of circumstantial evidence, a vast number of isolated and independent facts; and, in any case, where such acts and declarations are introduced in evidence, and the whole of the evidence introduced on the trial, taken together, shows that such a conspiracy actually exists, it will be considered immaterial whether the conspiracy was established before or after the introduction of such acts and declarations. The prosecution may either prove the conspiracy which renders the acts

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of the conspirators admissible in evidence, or it may prove the acts of the different persons, and thus prove the conspiracy.

34. In many important cases evidence has been given of a general conspiracy, before any proof of the particular part which the accused parties have taken. In some particular instances, in which it would be difficult to establish the defendant's privity without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity. The term "acts," as here used, includes written correspondence and other papers relative to the main design. - ^ ^

35. **DISPERSING PUBLIC ASSEMBLAGES—right of resistance.** A mere order to an assemblage of persons to disperse, although the meeting be lawfully convened and peacefully conducted, will not excuse the throwing of a bomb into a body of policemen giving the order.

36. If, however, a bomb-thrower were illegally and improperly attacked by the police, while quietly attending a peaceable meeting, and he threw the bomb to defend himself against such attack, another question would be presented.

37. **REASONABLE DOUBT—in criminal cases.** In a capital case, the trial court gave the rule as to a reasonable doubt, as affecting the finding of the jury, as follows: "The court instructs the jury, as matter of law, that in considering the case the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of 'not guilty.' If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt." The rule as thus formulated, has repeatedly received the approval of this court, and is correct.

38. In another instruction where the rule was somewhat differently expressed, these words were used: "You are not at liberty to disbelieve as jurors, if, from the evidence, you believe as men." This expression was unobjectionable.

39. **JURY AS JUDGES OF THE LAW—in criminal cases.** Under the statute providing that "juries in all criminal cases shall be judges of the law and fact," it is not improper for the court to tell the jury, that "if they can say upon their oaths that they know the law better than the court itself, they have the right to do so;" but that, "before saying this upon their oaths, it is their duty to reflect whether from their study and experience they are better qualified to judge of the law than the court."

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40. EVIDENCE—*accused testifying in his own behalf—latitude of cross-examination.* If a defendant in a criminal prosecution offers himself as a witness in his own behalf to disprove the criminal charge, he can not excuse himself from answering on cross-examination, on the ground that by so doing he may criminate himself. So far as concerns questions touching the merits, the defendant, by making himself a witness as to the offence, waives his privilege as to all matters connected with the offence.

41. IMPEACHING A WITNESS—*based upon reputation for truth.* Before a witness can swear that he will not believe a man under oath, he must first swear that he knows that man's reputation for truth and veracity among his neighbors, and that such reputation is bad. The unwillingness to believe under oath must follow from and be based upon two facts,—first, the fact that the witness knows the reputation for truth and veracity among the man's neighbors; second, the fact that such reputation is bad. As the reputation must be bad before it can be known to be bad, the most material fact to be proved is that such reputation is bad. What a man's reputation is, is a fact to be proved just as any other fact.

42. PRACTICE—*time to object—as to competency of evidence.* When it is desired to object to the receiving in evidence, in a criminal prosecution, of a letter purporting to have been written to the defendant, on the ground that it came into the hands of the prosecution by means of an unlawful seizure, the objection should be taken at the trial. It can not be made for the first time on error, in this court.

43. And in taking such an objection at the trial, the ground of it not appearing on the face of the offered evidence, but depending upon proof of an outside fact, the party objecting should prove that the letter was obtained by illegal seizure, and then move its exclusion, or oppose its admission, upon that ground. In that way the question of its admissibility could be raised.

44. INSTRUCTIONS—*if erroneous, when cured by others in the series.* It was complained of an instruction given in a series, in a capital case, that it omitted all *reference to the evidence*, as being the guide to the jury in their finding. The trial judge, of his own motion, after having given the instructions as asked by the respective parties, gave the following: "What are the facts and what is the truth the jury must determine *from the evidence, and from that alone.* If there are any unguarded expressions *in any of the instructions*, which seem to assume the existence of any facts, or to be any intimation as to what is proved, all such expressions must be disregarded, and the *evidence only* looked to to determine the facts." This was enough to cure the omission complained of. It is the duty of the jury to consider all the instructions together, and when this court can see that an instruction in the series, although not stating the law correctly, is qualified by others, so that the jury were not likely to be misled, the error will be obviated.

45. Although an instruction, considered by itself, is too general, yet if it is properly limited by others given on the other side, or by the court of its

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own motion, so that it is not probable that it could have misled the jury, judgment will not be reversed on account of such instruction.

46. SEPARATE TRIALS—*in criminal cases, where several are indicted.* Error can not be assigned upon the refusal of a trial court to grant separate trials where several are jointly indicted. It is a matter of discretion with the trial court.

47. JURY—*peremptory challenges in criminal cases—of the number given to the prosecution.* The statute says: "The attorney prosecuting on behalf of the People shall be admitted to a peremptory challenge of the same number of jurors that the accused is entitled to." Under this statute, in a case where several persons are jointly indicted and put upon trial, each being entitled to twenty peremptory challenges, the prosecution is entitled to a number equal to the aggregate of those accorded to all the defendants.

48. SAME—*competency of juror who has formed an opinion from rumor and from reading newspapers.* In a capital case a juror, upon his examination as to whether he had formed and expressed an opinion as to the guilt or innocence of the accused, stated that he had formed an opinion based upon rumor or newspaper statements, but that he had expressed no opinion as to the truth of such rumors or statements. He stated upon oath that he believed he could fairly and impartially render a verdict in the case in accordance with the law and evidence. A challenge for cause was overruled, it thereby appearing that the court was satisfied of the truth of his statement. This brought the case exactly within the scope and meaning of the statute prescribing the qualifications of jurors, and established his competency.

49. SAME—*competency—prejudice against crime, as a disqualification.* Upon the trial of several persons on the charge of murder, the crime being the result of an alleged conspiracy to establish anarchy in the place of government, and law and order, the conspirators themselves being anarchists, a person called as a juror, upon his examination, stated that he had a prejudice against socialists, communists and anarchists: *Held*, such prejudice was not a disqualification of the juror to sit in the case.

50. SAME—*statute prescribing qualifications of jurors—its constitutionality.* The third proviso of the 14th section of chapter 78, of the Revised Statutes, which provides, "that in the trial of any criminal cause the fact that a person called as a juror has formed an opinion or impression based upon rumor or newspaper statements, (about the truth of which he has expressed no opinion,) shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement," is not obnoxious to the objection that it is in violation of that clause of the constitution which guarantees to the accused party in every criminal prosecution "a speedy trial by an impartial jury."

51. SAME—*error in rulings as to competency, after peremptory challenges are exhausted.* A judgment of conviction in a criminal case will not

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be reversed for errors committed in the trial court in overruling challenges for cause to jurors, even though the defendant had exhausted his peremptory challenges, unless it is further shown that an objectionable juror was forced upon him and sat upon the case, after he had exhausted his peremptory challenges.

52. FORM OF VERDICT—*on trial for murder—direction in respect thereto.* On the trial of several persons upon the charge of murder, the trial court instructed the jury as to the form of their verdict, as follows: "If all the defendants are found guilty, the form of the verdict will be: 'We, the jury, find the defendants guilty of murder, in manner and form as charged in the indictment,' and fix the penalty." "If all are found not guilty, the form of the verdict will be, 'We, the jury, find the defendants not guilty.'" And correspondingly, in case part were found guilty and part not guilty. The verdict was, guilty of murder. It was objected by the defendants, that under this instruction, the jury were obliged to find the defendants guilty or not guilty of murder, whereas the jury were entitled to find that the offence was a lower grade of homicide than murder, if the evidence so warranted. But the objection was not well taken. If the defendants desired to have the jury differently instructed, they should have prepared an instruction accordingly.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

A collection of extracts from documentary evidence, found in the record in this cause, has been prepared as a preface to the opinion. These extracts are referred to in the opinion as being contained in a "statement" that precedes the opinion. That "statement," or collection of extracts, and the instructions referred to, and commented upon in the opinion, are as follows:

Extracts from articles which appeared in the "Arbeiter Zeitung" under the following dates:

February 23, 1885.—"The already approaching revolution promises to be much grander and more terrible than that at the close of the last century, which only broke out in one country. The common revolution will be general, for it makes itself already felt everywhere and generally. It will demand more sacrifices, for the number of those over whom we have to sit in judgment is now much greater than that of the last century."

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March 2, 1885.—"Our censure is not directed only against the workingmen of Philadelphia. It strikes especially, and in much higher degree, those dirty souls who carry on, as a business, the quieting of the working class, under idle promises of reform in the near future. * * * That thing could not have happened in Chicago, without placing for exhibition on the telegraph wires and cornices of houses, a dozen cadavers of policemen in pieces, for each broken skull of a workman. And this is due solely and purely to the *revolutionary propaganda carried on here.* * * * (We wonder) whether the workingmen of Chicago will take a lesson from this occurrence, and will at last supply themselves with *weapons, dynamite and prussic acid, as far as that has not been done yet.*"

March 11, 1885.—"The community will soon have to decide whether to be or not to be. Either the police must be, and then the community can not be; or the community must be, and then the police can not be. One, only, of the two, is possible."

March 16, 1885.—"In all revolutionary action three different epochs of time are to be distinguished: *First, the portion of preparation for an action, then the moment of the action itself, and finally that portion of time which follows the deed.* All these portions of time are to be considered one after another.

"In the first place, a revolutionary action should succeed. Then as little as possible ought to be sacrificed,—that is, in other words, *the danger of discovery ought to be weakened as much as possible, and, if it can be, should be reduced to naught.* This calls for *one of the most important tactical principles, which briefly might be formulated in the words: Saving of the combatants.* All this constrains us to further *explain the measures of organization and tactics which must be taken into consideration in such an action.*

"Mention was made of the *danger of discovery.* That is, in fact, present in all three of the periods of conflict. This

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danger is imminent in the preparation of the action itself, and finally, after the completion thereof. The question is now, how can it be met?"

"If we view the different phases of the development of a deed, we have, first, the time of preparation.

"It is easily comprehensible for everybody, that the danger of discovery is the greater the more numerous the mass of people or the group is which contemplates a deed, and vice versa. On the other hand, the threatening danger approaches the closer the better the acting persons are known to the authorities of the place of action, and vice versa. Holding fast to this, the following results:

"In the commission of a deed, a comrade who does not live at the place of action,—that is, a comrade of some other place,—ought, if possibility admits, to participate in the action; or, formulated differently, a revolutionary deed ought to be enacted where one is not known.

"A further conclusion which may be drawn from what was mentioned, is this:

"Whoever is willing to execute a deed, has, in the first place, to put the question to himself, whether he is able, or not, to carry out the action by himself. If the former is the case, let him absolutely initiate no one into the matter and let him act alone; but if that is not the case, then let him look, with the greatest care, for just as many fellows as he must have, absolutely,—not one more nor less; with these let him unite himself to a fighting group.

"The founding of special groups of action or of war is an absolute necessity. If it were attempted to make use of an existing group to effect an action, discovery of the deed would follow upon its heels, if it would come to a revolutionary action at all, which would be very doubtful. It is especially true in America, where reaction has velvet paws, and where asinine confidentially is, from a certain direction, directly without bounds. In the preparation, already, endless debates would

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develop; the thing would be hung upon the big bell; it would be at first a public secret, and then, *after the thing was known to everybody, it would also reach the long ears of the holy Hermandad,* (the sacred precinct of the watchman over the public safety,) which, as is known to every man, woman and child, hear the grass grow and the fleas cough.

"In the *formation of a group of action,* the greatest care must be exercised. Men must be selected who have head and heart in the right spot.

"Has the formation of a fighting group been effected, has the intention been developed, does each one see perfectly clear in the manner of the execution, then *action must follow with the greatest possible swiftness, without delay,* for now they move within the scope of the greatest danger, simply from the very adjacent reason, because the selected allies might yet commit treason without exposing themselves in so doing.

"In the *action itself,* one must be personally at the place, to select personally that point of the place of action, and that part of the action, which are the most important and are coupled with the greatest danger, upon which depend chiefly the success or failure of the whole affair.

"Has the *deed* been completed? Then the *group of action dissolves* at once, without further parley, according to an understanding which must be had beforehand, leave the place of action, and scatters to all directions.

"If this theory is acted upon, then the *danger of the discovery is extremely small,—yea, reduced to almost nothing;* and from this point of view the author ventures so say, thus, and not otherwise, must be acted, if the advance is to be proper.

"It would be an *easy matter* to furnish the *proof*, by the different revolutionary acts in which the history of the immediate past is so rich, that the executors sinned against the one or the other of the aforementioned principles, and that in this fact lies the cause of the discovery, and the loss to us of very important fellow-champions connected therewith; but we will

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be brief, and leave that to the individual reflection of the reader. But one fact is established—that is this: That all the mentioned rules can be observed without great difficulties; further, that the blood of our best comrades can be spared thereby; finally, as a consequence of the last mentioned, that light actions can be increased materially, for the complete success of an action is the best impulse to a new deed, and the things must always succeed when the rules of wisdom are followed.

"A further question which might probably be raised, would be this: *In case a special or conditional group must be formed for the purpose of action*, what is the duty, in that case, of the public groups, or the entire public organization, in view of the aforesaid actions? Well, the answer is very near at hand. In the first place, *they have to serve as a covering,—as a shield behind which one of the most effective weapons of revolution is bared*; then these permanent groups are to be the source from which the necessary pecuniary means are drawn and fellow-combatants are recruited; finally, the accomplished deeds are to furnish the permanent groups,—the material for critical illustration. These discussions are to wake the spirit of rebellion,—that important lever of the advancing course of the development of our race,—without which we would be forever nailed down to the state of development of a gorilla or an orang outang. This right spirit is to be inflamed, the revolutionary instinct is to be roused which still sleeps in the breast of man, although these monsters, which, by an oversight of nature, were covered with human skin, are honestly endeavoring to cripple the truly noble and elevated form of man by the pressure of a thousand and again a thousand years,—to morally castrate the human race. Finally, the means and form of conquest are to be found by untiring search and comparison, which enhance the strength of each proletarian a thousand-fold, and make him the giant Briareus, which alone is able to crush the ogres of capital."

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March 23, 1885.—“Yet one thing more. Although every day brings the news of collisions between armed murder-servs of the bourgeoisie with unarmed crowds of people, (strikers and the like,) we must ever and again read in the so-called workingmen’s papers, discussions of the question of arming ought to be avoided in the associations of the proletarian. *We characterize such pacifying efforts as criminal.*

“*Each workingman ought to have been armed long ago.* We leave it an open question whether whole corporations are able to completely fit themselves out in a military point of view, with all their numbers; but we say that each single one, if he has the necessary seriousness and the good will, can arm himself, little by little, very easily. *Daggers and revolvers are easily to be gotten. Hand grenades are cheaply to be produced; explosives, too, can be obtained; and finally, possibilities are also given to buy arms on installments.* To give an impulse in that direction one should never tire of. *For not only the revolution proper, approaching with gigantic steps, commands to prepare for it, but also the wage contests of to-day demand of us not to enter into it with empty hands.*

“*Let us understand the signs of the times! Let us have a care for the present, that we will not be surprised by the future, unprepared!*”

April 8, 1885.—“That is something worth hearing. A number of strikers in Quincy, yesterday, fired upon their bosses, and not upon the scabs. This is recommended most emphatically for imitation.”

May 5, 1885.—“When anywhere a small party of working-men dare to speak of rights and privileges, then the ‘order’ draw together all the murdering scoundrels of the whole city, (and, if necessary, from the whole country,) to put their sovereignty the more clearly before the sovereigns. In short, the whole power of the capital,—that is, the entire government,—

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is ever ready to suppress the petty demonstrations of the workingmen by force of arms, one after another,—now here, then there. This would be quite different if the workingmen of the entire country could only see that their class is in this wise subjected, part by part, without condition and without repartee. *The workingmen ought to take aim at every member of the militia, and do with him as one would do with some one of whom it is known that he is after taking one's life. It might then sooner be difficult to obtain murdering tools.*"

In a small notice, under the same heading, is this: "Workingmen, arm yourselves! Let the butchery of Lemont be a lesson to you."

May 7, 1885.—"Before you lies this blissful Eden. The road to it leads over the smoking ruins of the old world. Your passport to it is that banner which calls to you, in flaming letters, the word 'Anarchy.'"

June 19, 1885.—"It is scarcely necessary for us to say, in conclusion, that it would be an insane undertaking to meet the serfs of order with empty hands, and to allow one's self to be clubbed down and to be shot down without means of defence. Taking this into consideration, it appears clearly that it is more necessary than anything else, to arm one's self *as soon as possible*. Therefore, workingmen, do arm yourselves with the most effectual means. The better you do this the quicker the fight is fought, the sooner the victory is yours. Do not delay, for that would be your ruin."

June 20, 1885.—"Enough is now said about the importance of being armed, and another question approaches us now which also must be discussed. We are to go to work to supply ourselves, *as quickly as possible*, with these useful things. The price of them is too high than that one could buy them himself. The writer of these lines expresses his opinion, which does

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not intend to be too previous, to this effect: That special groups ought to form themselves to this end, which are to accomplish these things incorporeal, and which collect and pay the money in small sums, optional with each one, according to his means. Small contributions one can easily spare. One does not mind them, and he is, in this way, the sooner in fighting trim for our purposes. In explanation, it must also be said that dynamite bears several names here in America. Among others, it is known in trade also under the names of Hercules powder and giant powder.

"But we will not tire the reader any longer, and go about to close this article. The fable reports to us that founders of great and difficult works have been nursed by wild beasts,—among others, Romulus and Remus by a she-wolf. That is to be understood figuratively. It is not said that the founders of a great work must have something wolfish in their individuality, for such a beginning is ever the password in a fight, and in this it is meant for one to be a wild animal. Workingmen, fellows in misery, men of action! A creation greater, more important, higher, more elevated than one has ever been, it is for us to found and establish!"

· "The temple of the unveiled Goddess of Liberty upon the whole face of the globe. But to this end you must be wolves, and, as such, ye need sharp teeth. Workingmen, arm yourselves!"

In the "Arbeiter Zeitung" of April 29, 1885, is an editorial describing what is known as the "Board of Trade Meeting," in which it is stated, that in the procession which marched past the board of trade, there "marched a strong company of well-armed comrades of the various groups. Let us remark, here, that, with perhaps few exceptions, they were all well armed, and that also the nitro-glycerine pills were not missing. They were prepared for a probable attack, and if it had come to a collision there would have been pieces. The cordons of the police could have been quite excellently adapted for experiments with explosives! About twenty detectives were loitering about the Market square at the beginning, and then

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disappeared. That explains the keeping back of our otherwise impertinent order,—scoundrels."

October 5, 1885.—“The question which presents itself to the wage-worker is this: Will you look on quietly that they eject in such manner those who have shown themselves most willing to be sacrificed, and that they are driven from house and home, and persecuted with the whip of hunger,—will you or will you not? *And if they do not want that, there is no other way than to become immediately soldiers of the revolutionary army, and establish conspiring groups, and let the ruins fall on the home of such.*”

October 8, 1885.—“All organized workingmen in this country, no matter what views they might have otherwise, should be united on one point,—they should engage in a general prosecution of Pinkerton’s secret police. No day should pass without a report being heard, from one place or another, of the finding of a carcass of one of Pinkerton’s,—that this should be kept up until nobody would consent to become the blood-hound of these assassins.”

In the issue of the same paper, of December 29, 1885, is a report of a meeting of the North Side group, at 58 Clybourn avenue, which is as follows:

“The following resolutions were adopted:

“This assembly declares, that the North Side group, I. A. A., pledges itself to work, with all means, for the introduction of the eight-hour day, beginning on the 1st of May, 1886. *At the same time, the North Side group cautions the workingmen not to meet the enemy unarmed, on the 1st of May,*” etc.

January 22, 1886.—“The eight-hour question is not, or at least should not be, the final end of the present organization, but, in comparison to the present state of things, a progress not to be underrated. But now let us consider the question

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in itself. How is the eight-hour day to be brought about? Why, the thinking workingman must see for himself, under the present power of capital in comparison to labor, it is impossible to enforce the eight-hour day in all branches of business, otherwise than with *armed force*. With empty hands the workingmen will hardly be able to cope with the representatives of the club, in case, after the 1st of May of this year, there should be a general strike. Then the bosses will simply employ other men,—so-called 'scabs.' Such will always be found.

"The whole movement, then, would be nothing but filling the places with new men; *but if the workingmen are prepared to eventually stop the working of the factories, to defend himself, with the aid of dynamite and bombs, against the militia, which will, of course, be employed, then, and only then, you can expect a thorough success of the eight-hour movement.*

"Therefore, workingmen, I call upon you, arm yourselves."

In the "Arbeiter Zeitung," November 27, 1885, is the following:

"LETTER Box, S.—Steel and iron are not on hand, but tin two or three inches in diameter. The price is cheap. It does not amount to fifty cents apiece."

During the months of December, 1885, January, February and March, 1886, appeared the following notice, headed "Exercise in Arms:"

"Workingmen who are willing to exercise in the handling of arms, should call every Sunday forenoon, at half-past nine, at No. 58 Clybourn avenue, where they will receive instructions gratuitously."

In the "Arbeiter Zeitung" of March 2, 15, 18 and 25, 1886, appeared the following notice:

"'Revolutionary Warfare' has arrived, and is to be had through the librarian, at 107 Fifth avenue, at the price of ten cents."

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This was not a paid advertisement, as appears from the testimony of Fricke, the business manager of the "Arbeiter Zeitung," as also from the testimony of Seiger, the translator.

In the issue of March 15, 1886 :

"LETTER Box.—Seven lovers of peace. A dynamite cartridge explodes not through mere concussion, when thrown. A concussion primer is necessary."

In the "Arbeiter Zeitung" of January 6, 1886, appeared the following editorial :

"A NEW MILITIA LAW.

"To return to the Lehr und Wehr Verein, we have already said, that after the adoption of the law, the shallow waters would gradually dry up. That lasted until about the fall elections of 1879, when, at once, the socialistic vote shrunk to four thousand votes,—in the spring there were over twelve thousand,—then the whole 'movement,' to which (we) look back with unaccountable pride, was stopped. What was done for the mass of the people has proved to be a shallow and unclean * * *

"Well, let us drop the subject. The lesson of 1877 has, meanwhile, been forgotten. Politically, they could not do much with it, and in a business sense,—well, after the failure of the movement,—there was not much the matter. To be brief, it did not *pay* any more to be a socialist or an armed proletarian: The thing didn't pay any more, and of the big pile there remained but a very little pile. But this little pile was a good one, and had lately achieved more than formerly the big pile. *The army has since made a gigantic progress. Where six years ago a thousand men had been armed with muskets, the majority of which are even to-day on hand, we find, to-day, a power which can neither be fought by law nor by force. Where a military organization existed formerly, the strength of which was well known, there exists, to-day, an invisible network of fighting groups, the dimensions of which are beyond any calculation, and*

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therefore this organization is a timely one. To the above law we are partially indebted for that."

January 23, 1886.—“Brief is the space of time until the eventful day. The working people feel that something must be done. The conditions force them to wake up from slumber. Already an immense mass is without means of subsistence. They are more and more meagre. Capital sucks the marrow out of the bones of the workingmen.

“But why do we complain? Why do we murmur? We have no right to. Do we not know that all the misery, all the want, are the necessary consequence of the present state of society? As long as we admit that we are pariahs,—that we are born to submit our necks, as slaves, under the whip of hunger, of extortioners,—as long as we admit that, we have no right to complain. Therefore, associates in misery,—for this pressure has finally become unbearable,—do not let us treat peaceably with our deadly enemies on the first of May. We do not want to cheat ourselves for the hundredth time that we would get from them, in a peaceable and harmonious way, even the least for the betterment of our situation. We have so many examples and experiences, that even the large and indifferent mass does not believe any more that an agitation which tends to ameliorate the condition of the workingmen in a harmonious way, would be of any purpose to those people,—and I, for one, think they are right. On the first of May, also, we will have an example of how harmoniously the capitalists will have our skulls crushed by their hirelings, if, out of sheer love of harmony, we will stand by with our fists in our pockets. He who employs the best means of battle, and uses them, is the victor. Force is right, (by Bismarck,) and if once we have seen that, on account of our unanimity and the modern means of warfare, we have the power, then we will also see we have the right, and that it is a great stupidity to work for that rabble of parasites instead of ourselves.

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"Therefore, comrades, armed to the teeth, we want to demand our rights on the first of May. In the other case there are only blows of the club for you."

In the issue of February 17, 1886, is an editorial: "That the conflict between capitalism and workingmen is taking constantly a sharper form, is to be hailed, inasmuch as thereby the decision will be (word out.) *Hundreds and thousands of reasons indicate that force will bring about the decisive results in the battle for liberty, and the more conscious the masses are, in that conflict, of their irresistible power, the nearer will be the approaching spring-tide of the people."*"

March 2, 1886.—"The order-scoundrels beamed yesterday morning in their full glory. With the help of pick-pockets, (the natural allies of professional cut-throats, who otherwise call themselves also detectives,) they succeeded yesterday in taking seventy scabs to the factory, accompanied also by scoundrels of the secret service, to give a better appearance. This morning the number of the scabs which went back to work was materially increased. At this opportunity it was once again seen for what purpose the police existed: to protect the workingman if he works for starvation wages, and is an obedient serf; to club him down when he rebels against the capitalistic herd of robbers. Force only gives way to force. *Who wants to attack capitalism in earnest, must overthrow the body-guards of it,—the well-drilled and well-armed 'men of order,'—and kill them, if he does not want to be murdered himself. But for this is needed an armed and systematically drilled organization.*"

On the same page: "*The time up to the first of May is short. Look out!*"

In the issue of April 20 is an editorial: "As long as the people in the kitchen of life are satisfied with the smell of the roast, and feeds his empty stomach with the idea of national

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greatness, national riches, national liberty of the poll, the glutton is always for liberty. Why not? It is useless to others, and he feels comfortable with it. Freedom of making contracts,—most sacred constitutional right of mankind,—why shouldst thou not be welcome to gentlemanly gluttons? * * * *It is true that hundreds have armed themselves; but thousands are still unarmed.* Every trades-union should make it obligatory to every member to keep a good gun at home, and ammunition. The time is probably not very far where such neglect would be bitterly felt, and the governing class is prepared, and their demands and their importunes are backed by muskets and Gatling guns. Workingmen, follow this example."

March 19, 1886.—“The only aim of the workingmen should be the liberation of mankind from the shackles of the existing damnable slavery. Here, in America, where the workingman possesses yet the freedom of meeting, of speech, and of the press, most should be done for the emancipation of suffering mankind. But the press gang and the teachers in the schools do all in their power to keep the people in the dark. Thus everything tends to degrade mankind more and more, from day to day, and this effects a ‘beastening,’ as is observable with Irishmen, and more apparent, even, with the Chinese.

“If we do not soon bestir ourselves for a bloody revolution, we can not leave anything to our children but poverty and slavery. Therefore prepare yourselves, in all quietness, for the revolution.”

In the issue of April 21, 1886, appears an editorial, as follows: “*The love for law on the part of the workingman is not so well established, if put to the test.* But the hypocritical peace assurances in quiet times are in the way of preparations for serious conflict. When it comes to serious occasions, it unfortunately happens that very often the workingmen break their heads on the walls of the law. *The desire to ignore the law is there, but it remains a desire.* Possible action

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means to remain unorganized, and to stand anything that the extortioner may see fit to do.

"He who submits to the present order of things has no right to complain about capitalistic extortion, for order means sustaining that; and he who revolts against the institutions vouchsafed by the constitution and the laws, is a rebel, and has no right to complain if he is met by soldiers. Every class defends itself as well as it can. A rebel who puts himself opposite the mouth of the cannons of his enemies, with empty fists, is a fool."

April 28, 1886.—Editorial on second page, headed "Editorial:" "What anarchists have predicted months ago, they have realized now. In quiet times the shackles of law were forged, to apply them in tempestuous times. From dusty garrets they have fetched their musty law books, and so, by a practical application of American liberty, tried to build a wall against the stream of the laborers' movement.

"Well, after you have erected protecting walls in the shape of laws, we will have to break them. The theory of the homœopath, 'like cures like,' is applicable here. The power of the associate manufacturers and their state must be met by labor associations. *The police and soldiers who fight for that power must be met by armed armies of workingmen. The logic of facts requires this. Arms are more necessary in our times than anything else. Whoever has no money, sell his watch and chain to buy firearms for the amount realized. Stones and sticks will not avail against the hired assassins of the extortionists. It is time to arm yourselves.*

"What a modest demand, the introduction of the eight-hour day! And yet a corps of madmen could not demean themselves worse than the capitalistic extortioners. They continually threaten with their disciplined police and their strong militia, and those are not empty threats, indeed. This is proved by the history of the last few years. It is a nice thing, this patience; and the laborer, alas! has too much of this

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article, but one must not indulge in a too frivolous play with it. If you go further, his patience will cease; then it will be no longer a question of the eight-hour day, but a question of emancipation from wage slavery."

April 29, 1886.—Editorial: "If the legitimate means of the thieves and scoundrels who practice extortion on their fellow-men, are exhausted, then they resort to force. A wage-slave who is not utterly demoralized should always have a breech-loader and ammunition in his house."

April 30, 1886.—"What will the first of May bring? The workingmen bold and determined. The decisive day has arrived. The workingman, inspired by the justice of his cause, demands an alleviation of his lot, a lessening of his burden. The answer, as always, is: 'Insolent rabble! Do you mean to dictate to us? That you will do to your sorrow. Hunger will soon rid you of your desire for any notions of liberty. Police, executioners and militia will give their aid.' Men of labor, so long as you acknowledge the gracious kicks of your oppressors with words of gratitude, so long you are faithful dogs. Have your skulls been penetrated by a ray of light, or does hunger drive you to shake off your servile nature, you offend your extortioners. They are enraged, and will attempt, through hired murderers, to do away with you like mad dogs."

April 30, 1886.—(Editorial of this date quoted in opinion.)

May 1, 1886.—"Bravely forward. The conflict has begun. An army of wage-laborers are idle. Capitalism conceals its tiger claws behind the ramparts of order. Workmen, let your watchword be: No compromise! Cowards to the rear! Men to the front. The die is cast. The first of May has come. For twenty years the working people have been begging extortioners to introduce the eight-hour system, but have been

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put off with promises. Two years ago they resolved that the eight-hour system should be introduced in the United States on the first day of May, 1886. The reasonableness of this demand was conceded on all hands. Everybody, apparently, was in favor of shortening the hours; but, as the time approached, a change became apparent. That which was in theory modest and reasonable, became insolent and unreasonable. It became apparent, at last, that the eight-hour hymn has only been struck up to keep the labor dunces from socialism.

"That the laborers might energetically insist upon the eight-hour movement, never occurred to the employers. And it is proposed again to put them off with promises. We are not afraid of the masses of laborers, but of their pretended leaders. Workmen, insist upon the eight-hour movement. 'To all appearances it will not pass off smoothly.' The extortioners are determined to bring their laborers back to servitude by starvation. It is a question whether the workmen will submit, or will impart to their would-be murderers an appreciation of modern views. We hope the latter."

In the "Arbeiter Zeitung" of the same day, (Saturday, May 1,) the following editorial notice appeared on the first page: "It is said that on the person of one of the arrested comrades, in New York, a list of membership has been found, and that all the comrades compromised had been arrested. *Therefore, away with all rolls of membership, and minute-books, where such are kept. Clean your guns, complete your ammunition. The hired murderers of the capitalists, the police and militia, are ready to murder. No workingman should leave his house in these days with empty pockets.*"

The next day, Sunday, May 2, 1886, there appeared in the "Fackel," which was the Sunday edition of the "Arbeiter Zeitung," the following words: "Letter-box Y. Come Monday night." This was a summons to the members of the

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armed sections of the different groups to meet at Greif's Hall on the next evening, to-wit., on the evening of Monday, May 3, 1886.

In the same Sunday issue of the "Arbeiter Zeitung," called "Die Fackel," published on May 2, 1886, appeared the following passage: "Even where the workingmen are willing to accept a corresponding reduction of wages with the introduction of the eight-hour system, they were mostly refused. 'No, ye dogs,—you must work ten hours; that's the way we want it,—we're your bosses.' Something like this was the answer of the majority, translated into intelligible language.

"In the face of this fact, it is pitiful and disgusting; but more than that, it is treacherous, to warn the strikers against energetic, uncompromising measures.

"Everything depends upon quick and immediate action. The tactics of the bosses are to gain time; the tactics of the strikers must be to grant them no time. By Monday or Tuesday the conflict must have reached its highest intensity, else the success will be doubtful. Within a week, the fire, the enthusiasm, will be gone, and then the bosses will celebrate victories."

May 3, 1886.—"A hot conflict. The determination of the radical elements brings the extortioners in numerous instances to terms. The capitalistic press has good grounds for abusing the Reds. Without them no agitation. Numerous meetings. The general situation at noon, to-day, was encouraging. A considerable number of extortioners had capitulated this morning, and further capitulations are looked for in the course of the day. The freight-handlers were marching in full force from depot to depot at noon to-day. It was rumored that 'scabs' had been imported from Milwaukee. The railroad depots are occupied by special policemen, while the municipal minions of order, under the command of five lieutenants, have entrenched themselves in the Armory. The arch-rascals have made provisions for good victuals and drink. The laborers

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in the stone yards have formed a union. * * * They went on a strike. The stone-cutters and masons are compelled to join in the strike. *A strike will probably take place in the lumber districts.* The brewers plan a strike if their bosses do not fully accede to their demand to-day. In the furniture business, strike and lock-out, respectively, still continue. * * * The cabinet-makers' union will make no compromise. The metal-workers are confident of victory. *The number of strikers to-day can not be determined, but will probably amount to forty thousand.*

"Courage, courage is our cry. Don't forget the words of Herways: 'The host of the oppressors grows pale, when thou, weary of thy burden, in the corner puttest the plow; when thou sayest, It is enough.'"

In the "Arbeiter Zeitung" of Tuesday, May 4, 1886, appeared the following article, written by Spies:

"BLOOD.

"Lead and Powder as a Cure for dissatisfied Workmen!

"About six Laborers mortally and four times that number slightly Wounded!"

"Thus are the Eight-hour Men to be intimidated!

"This is Law and Order!

"Brave Girls parading the City!"

"The Law and Order Beast frightens the Hungry Children away with Clubs!"

GENERAL NEWS.

"Six months ago, when the eight-hour movement began, there were speakers and journals of the I. A. A. who proclaimed and wrote: 'Workmen, if you want to see the eight-hour system introduced, arm yourself. If you do not do this you will be sent home with bloody heads, and birds will sing May songs upon your graves.' ('That is nonsense,' was the reply. 'If the workmen are organized, they will gain the eight hours in their Sunday clothes.') Well, what do you say, now?

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Were we right or wrong? Would the occurrence of yesterday have been possible if our advice had been followed?

"Wage-workers, yesterday the police of this city murdered, at the McCormick factory, so far as it can now be ascertained, four of your brothers, and wounded, more or less seriously, some twenty-five more. If brothers who defended themselves with stones, (a few of them had little snappers in the shape of revolvers,) had been provided with good weapons *and one single dynamite bomb, not one of the murderers would have escaped his well-merited fate.* As it was, only four of them were disfigured. That is too bad. The massacre of yesterday took place in order to fill the forty thousand workmen of this city with fear and terror,—took place in order to force back into the yoke of slavery the laborers who had become dissatisfied and mutinous. Will they succeed in this? Will they not find, at last, that they miscalculated? The near future will answer this question. We will not anticipate the course of events, with surmises.

"The employes in the lumber yards on the South Side held a meeting yesterday afternoon, at the Black road, about one-quarter mile north of McCormick's factory, *for the purpose of adopting resolutions in regard to their demands, and to appoint a committee to wait upon a committee of lumber-yard owners, and present the demands which had been agreed upon.*

"It was a gigantic mass that had gathered. Several members of the lumber yard union made short addresses in English, Bohemian, German and Polish. Mr. Fehling attempted to speak, but when the crowd learned that he was a socialist, he was stoned, and compelled to leave the improvised speaker's stand on a freight car. Then, after a few more addresses were made, the president introduced Mr. August Spies, who had been invited as a speaker. A Pole or Bohemian cried out: '*That is a socialist!*' and again there arose a storm of disapprobation, and a roaring noise, which proved sufficiently that these ignorant people had been incited against the socialists by their

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priests. But the speaker did not lose his presence of mind. He continued speaking, and very soon the utmost quiet prevailed. He told them that they must realize their strength over against a little handful of lumber-yard owners ; that they must not recede from the demands once made by them. The issue lay in their hands. All they needed was resolution, and the 'bosses' would be compelled to and would give in.

"At this moment some persons in the background cried out (either in Polish or Bohemian) : 'On to McCormick's ! Let us drive off the scabs !' About two hundred men left the crowd, and ran towards McCormick's.

"The speaker did not know what was the matter, and continued his speech. When he had finished, he was appointed a member of a committee to notify the 'bosses' that the strikers had no concessions to make. Then a Pole spoke. While he spoke, a patrol wagon rushed up towards McCormick's. The crowd began to break up. In about three minutes several shots were heard near McCormick's factory, and these were followed by others. At the same time, about seventy-five well-fed, large and strong murderers, under the command of a fat police lieutenant, were marching toward the factory, and on their heels followed three patrol wagons besides, full of law and order beasts ; two hundred policemen were on the spot in less than ten or fifteen minutes, and the firing on fleeing workingmen and women resembled a promiscuous bush-hunt. *The writer of this hastened to the factory as soon as the first shots were fired, and a comrade urged the assembly to hasten to the rescue of their brothers who were being murdered, but no one stirred.* 'What do we care for that ?' was the stupid answer of poltroons brought up in cowardice. The writer fell in with a young Irishman who knew him. 'What miserable sons of b—— are those,' he shouted to him, 'who will not turn a hand while their brothers are being shot down in cold blood ! We have dragged away two. I think they are dead. If you have any influence with the people, for Heaven's sake run back and

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urge them to follow you.' *The writer ran back. He implored the people to come along,—those who had revolvers in their pockets,—but it was in vain. With an exasperating indifference they put their hands in their pockets, and marched home, babbling as if the whole affair did not concern them in the least.* The revolvers were still crackling, and fresh detachments of police, here and there bombarded with stones, were hastening to the battle ground. The battle was lost!

"It was in the neighborhood of half past three o'clock when the little crowd of between two and three hundred men reached McCormick's factory. Policeman West tried to hold them back with his revolver. A shower of stones for an answer, put him to flight. He was so roughly handled that he was afterwards found about one hundred paces from the place, half dead, and groaning fearfully. The small crowd shouted: 'Get out, you d——d scab,' 'you miserable traitors,' and bombarded the factory window with stones. The little guard-house was demolished. The 'scabs' were in mortal terror, when, at this moment, the Hinman street patrol wagon, summoned by telephone, came rattling along with thirteen murderers. When they were about to make an immediate attack with their clubs, they were received with a shower of stones. 'Back! Disperse!' cried the lieutenant, and the next minute there was a report. The gang had fired on the strikers. They pretend, subsequently, that they shot over their heads. But, be that as it may, a few of the strikers had little snappers of revolvers, and with these returned the fire. In the meantime, other detachments had arrived, and the whole band of murderers now opened fire on the little company,—twenty thousand, as estimated by the police organ, the '*Herald*',—while the whole assembly scarcely numbered eight thousand! Such lies are told. With their weapons, mainly stones, the people fought with admirable bravery. They laid out half a dozen blue-coats, and their round bellies, developed to extreme fatness in idleness and luxury, tumbled about, groaning on the ground.

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Four of the fellows are said to be very dangerously wounded. Many others, alas, escaped with lighter injuries. (The gang, of course, conceals this, just as in '77 they carefully concealed the number of those who were made to bite the dust.) But it looked worse on the side of the defenceless workmen. Dozens who had received slight shot wounds hastened away amid the bullets which were sent after them. The gang, as always, fired upon the fleeing, while women and men carried away the severely wounded. How many were really injured and how many were mortally wounded could not be determined with certainty, but we think we are not mistaken when we place the number of mortally wounded at about six and those slightly injured at two dozen. We know of four, one of whom was shot in the spleen, another in the forehead, another in the breast, and another in the thigh. A dying boy, Joseph Doedick, was brought home on an express wagon by two policemen. The people did not see the dying boy; they saw only the two murderers. 'Lynch the rascals!' clamored the crowd. The fellows wanted to break away and hide themselves; but in vain. They had already thrown a rope around the neck of one of them, when a patrol wagon rattled into the midst of the crowd, and prevented the praiseworthy deed. Joseph Hess, who had put the rope around his neck, was arrested.

"The scabs were afterwards conducted, under the protection of a strong escort, down Blue Island avenue. Women and children gave vent to their indignation in angry shouts; rotten eggs whizzed through the air. The men about took things coolly, and smoked their pipes as on Kirmess day.

"McCormick's assistant, Superintendent C. J. Bemly, was also wounded, and, indeed, quite severely.

"The following strikers were arrested: Ignatz Erban, Frank Kohling, Joseph Schuky, Thomas Klafski, John Patolski, Anton Sevieski, Albert Supitar, Hugh McWhifter, Anton Sternack, Nick Wolna and Thomas O'Connell.

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"The 'pimp,' McCormick, when asked what he thought of it, said: 'August Spies made a speech to a few thousand anarchists. It occurred to one of these brilliant heads to frighten our men away. He put himself at the head of a crowd, which then made an attack upon our works. Our workmen fled, and in the meantime the police came and sent a lot of anarchists away with bleeding heads.'

"Last night thousands of copies of the following circular were distributed in all parts of the city:" (And then follows the German portion of the Revenge Circular.)

The following extracts appeared in the "Alarm," under the following dates:

October 18, 1884.—"One man armed with a dynamite bomb is equal to one regiment of militia, when it is used at the right time and place. Anarchists are of the opinion that the bayonet and Gatling gun will cut but sorry part in the social revolution. The whole method of warfare has been revolutionized by latter-day discoveries of science, and the American people will avail themselves of its advantages in the conflict of upstarts and contemptible braggarts who expect to continue their rascality under the plea of preserving law and order."

October 25, 1884.—"A weak opposition, or an opposition that is believed to be weak, will cause bloodshed, but an opposition that is known to be sufficiently strong for certain victory will command and obtain a bloodless surrender. This is why the communist and anarchist urges the people to study their school books on chemistry, and read the dictionaries and cyclopedias on the composition and construction of all kinds of explosives, and make themselves too strong to be opposed with deadly weapons. This alone can insure against bloodshed. Every person can get this knowledge inside of one week, and a majority now have one or more books, containing all this information, right in their own homes. And every man who is master of these explosives can not be even ap-

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proached by an army of men. Therefore, bloodshed being useless, and justice being defenceless, people will be forced to deal justly and generously with each other."

November 1, 1884.—"How can all this be done? Simply by making ourselves masters of the use of dynamite, then declaring we will make no further claim to ownership in anything, and deny every other person's right to be the owner of anything, and administer instant death, by any and all means, to any and every person who attempts to continue to claim personal ownership in anything. This method, and this alone, can relieve the world of this infernal monster called the 'right of property,'

"Let us try and not strike too soon, when our numbers are too small, or before more of us understand the use and manufacture of the weapons.

"To avoid unnecessary bloodshed, confusion and discouragement, we must be prepared, know why we strike and for just what we strike, and then strike in unison and with all our might.

"Our war is not against men, but against systems; yet we must prepare to kill men who will try to defeat our cause, or we will strive in vain.

"The rich are only worse than the poor because they have more power to wield this infernal 'property right,' and because they have more power to reform, and take less interest in doing so. Therefore, it is easy to see where the bloodiest blows must be dealt.

"We can expect but few or no converts among the rich, and it will be better for our cause if they do not wait for us to strike first."

November 15, 1884.—"What, then, is the use of an army? What is to prevent its destruction in the same manner? Dynamite is the emancipator! In the hand of the enslaved, it cries aloud: 'Justice or—annihilation.' But, best of all, the workingmen are not only learning its use,—they are going to use it. They will use it,—and effectually,—until personal

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ownership,—property rights,—are destroyed, and a free society and justice becomes the rule of action among men. There will then be no need for government, since there will be none to submit to be governed. Hail to the social revolution! Hail to the deliverer—*dynamite*."

November 29, 1884.—“The moment you pay a man for what he produces, he will take that pay and then spend his energies in taking advantage of somebody with it. *Down with pay, and dynamite the man who claims it; and hang him who will not let his energies produce something. This is socialism.*

“Upon this principle,—and this only,—can all humanity be raised up, and upon this principle alone can we stop all this quarreling, robbing, starving and throat-cutting. There is no reason on earth why any living being should have less of the benefits and pleasures of this world than — now possesses. The idea that the world can have no more than there are dollars to every representative, is ridiculous nonsense. There isn’t money enough in the world to represent the amount of fine combs and tooth-brushes that humanity ought to possess. Down with this infernal nonsense that we must measure everything by money. We have no just use for money, or for banks, or for brokers, or for insurers, or jailers, or for any other hoodlum classes who are wickedly wasting the energy of their whole lives. *Nothing but an uprising of the people, and a bursting open of all stores and storehouses to the free access of the public, and a free application of dynamite to every one who opposes, will relieve the world of this infernal nightmare of property and wages.* Down with such wretched nonsense. No rascality or stupidity is sacred because it is old. Down with it!”

December 6, 1884—“One dynamite bomb, properly placed, will destroy a regiment of soldiers,—a weapon easily made, and carried with perfect safety in the pockets of one’s clothing. The First regiment may as well disband, for if it should ever

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level its guns upon the workingmen of Chicago, it can be totally annihilated."

November 29, 1884.—“The Black Flag! The emblem of hunger, unfurled by the proletariats of Chicago. The red flag borne aloft by thousands of workingmen on Thanksgiving day. The poverty of the poor is created by the robberies of the rich. Speeches, resolutions and a grand demonstration of the unemployed, the tramps and the miserables of the city. Significant incidents. * * *

"Mr. Parsons then called for the resolutions, which were then read as follows:

"WHEREAS, We have outlived the usefulness of the wage and property system, that is now and must hereafter cramp, limit and punish all increase of production, and can no longer gratify the necessities, rights and ambitions of man; and

"WHEREAS, The right of property requires four times more effort to adjust it between man and man, than is required to produce, manufacture and distribute it; therefore, be it

"Resolved, That property rights should no longer be maintained or respected; that the great army of useless workers, among which are the lawyers, insurers, brokers, canvassers, jailers, police, politicians, armies and navies,—including all useless employes whose sole business is to adjust property claims between man and man,—should be deprived of this useless and corrupting employment, and be allowed to spend their energies producing, manufacturing and delivering the necessaries and luxuries of life.

"And this is impossible so long as man continues to pay or receive pay for production; therefore, be it further

"Resolved, That no man shall pay for anything, or receive pay for anything, or deprive himself of what he may desire, that he finds out of use or vacant. While none can eat more than they ought, under any system, or wear more than one suit of clothes at a time, or occupy more than one house at a

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time, yet, as a free access to all will require more production; therefore, be it further

"Resolved, That any person who will not spend a reasonable portion of energy in the production, manufacture or distribution of the necessaries, comforts and luxuries of life is the enemy of all mankind, and ought to be treated as such. He who will willfully or maliciously waste is no better.

"As this system can not be introduced against existing ignorance, selfishness and distrust, without the force of arms and strong explosives; therefore, be it

"Resolved, That when all stores, storehouses, vacant tenements and transporting property are thrown open and held open to the free access of the general public, the good of mankind and the saving of blood requires that all forcible opposition should be dealt with summarily, as fast as it may present itself," etc.

January 13, 1885.—“We are told that force is cruel. But this is only true when opposition is less cruel. If the opposition is a relentless power,—that is, starving, freezing, exposing and depriving tens of thousands, and the application of force would require less suffering while removing the old cause,—then the force is humane. *Seeing the amount of needless suffering all about us, we say a vigorous use of dynamite is both humane and economical.* It will, at the expense of less suffering, prevent more. It is not humane to compel ten persons to starve to death when the execution of five persons would prevent it.

“It is upon this theory that we advocate the use of dynamite.

“It is clearly more humane to blow ten men into eternity than to make ten men starve to death.”

February 21, 1885.—“The deep-rooted, malignant evil which compels the wealth-producers to become the dependent hewlings of a few capitalistic czars, can not be reached by means of the ballot.

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"The ballot can be wielded by free men alone; but slaves can only revolt, and rise in insurrection against their despoilers.

"Let us bear in mind the fact that here in America, as elsewhere, the worker is held in economic bondage by the use of force, and the employment of force, therefore, becomes a necessity to his economic emancipation! Poverty can't vote!"

January 9, 1885.—

"THE RIGHT TO BEAR ARMS.

"The conspiracy of the ruling against the working classes, in 1877, the breaking up of the monster meeting on Market square, the brutal assault upon a gathering of furniture workers in Vorwärts Turner Hall, the murder of Tessmann, and the general clubbing and shooting down of peaceably inclined wage-workers by the blood-hounds of 'law and order,'—greatly enraged the producers in this city, and also convinced them that they had to do something for their future protection and defence. The result was the organization of an armed proletarian corps, known as the '*Lehr und Wehr Verein*.' About one and one-half years later, this 'corps' had grown so immensely that it numbered over one thousand well-equipped and well-drilled men.

"Such an organization the 'good citizens' of our 'good city' considered a menace to the common weal, public safety and good order, as one might easily imagine, and they concluded that 'something had to be done.' And very soon after something was done. The State legislature passed a new 'militia law,' under which it became a punishable offence for any body of men, other than those patented by the Governor and chosen as the guardians of 'peace,' to assemble with arms, drill or parade the streets. This law was expressly aimed at the '*Lehr und Wehr Verein*,' who, as a matter of course, did not enjoy the sublime confidence and favor of 'His Excellency.' * * * *Where there once was a military body of men publicly organized, whose strength could be easily ascertained,*

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there exists an organization now whose strength can not even be estimated,—a network of destructive agencies, of a modern military character, that will defy any and all attempts of suppression. We don't grumble. Make more 'laws' if you like."

February 21, 1885.—"Dynamite! Of all the good stuff, this is the stuff. Stuff several pounds of this sublime stuff into an inch pipe, (gas or water pipe,) plug up both ends, insert a cap with a fuse attached, place this in the immediate neighborhood of a lot of rich loafers who live by the sweat of other people's brows, and light the fuse. A most cheerful and gratifying result will follow. In giving dynamite to the down-trodden millions of the globe, science has done its best work. The dear stuff can be carried around in the pocket without danger, while it is a formidable weapon against any force of militia, police or detectives that may want to stifle the cry for justice that goes forth from the plundered slaves. It is something not very ornamental, but exceedingly useful. It can be used against persons and things. It is better to use it against the former than against bricks and masonry. It is a genuine boon for the disinherited, while it brings terror and fear to the robbers. It brings terror only to the guilty, and consequently, the Senator who introduced a bill in Congress to stop its manufacture and use must be guilty of something. He fears the wrath of an outraged people that has been duped and swindled by him and his like. The same must be the case with the 'servant' of the people who introduced a like measure in the Senate of the Indiana legislature. All the good this will do! Like everything else, the more you prohibit it, the more it will be done. Dynamite is like Banquo's ghost,—it keeps on fooling around, somewhere or other, in spite of his satanic majesty. A pound of this good stuff beats a bushel of ballots all hollow, and don't you forget it! Our law-makers might as well try to sit down on the crater of a volcano or a bayonet as to endeavor to stop the manufacture and use of dynamite. It takes more justice and right than is contained in laws to

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quiet the spirit of unrest. *If workingmen would be truly free, they must learn to know why they are slaves. They must rise above petty prejudice and learn to think. From thought to action is not far, and when the worker has seen the change, he need but look a little closer to find, near at hand, the sledge with which to shatter every link. The sledge is dynamite.*"

March 7, 1885.—"Our agitators. The agitation trips of comrades Gorsuch, Fielden and Griffin, during the past two weeks, was prolific of good results. Twelve American groups were organized in different cities, and those united with the International are working to bring into the ranks of the revolutionary army the proletariats of the contiguous districts. The working people's International Association now embraces eighty groups, scattered all over the United States, mainly in centers of industry, from which the propagandism radiates everywhere, the membership being many thousands. In Chicago, with thousands of members, five newspapers, with increasing circulations, are published. The good work goes bravely on, and exertions should be redoubled.

"Agitation for the purpose of organization,—organization for the purpose of rebellion against wage slavery,—is the duty of the hour."

March 21, 1885.—

"How to MAKE DYNAMITE.

"The next issue of the 'Alarm' will begin the publication of a series of articles concerning revolutionary warfare, viz.: 'The manufacture of dynamite made easy.' 'Manufacturing bombs.' 'How to use dynamite properly.' 'Exercises in the use of dynamite by the military department of the United States and other countries.' Each of these articles will be complete and thorough on the subject considered by them. Agents can order copies of paper containing the above information, in advance."

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April 18, 1885.—“The moment the abolition of a government is suggested, the mind pictures the uprising of a hundred little despotic governments on every hand, quarreling among themselves, and domineering over the unorganized people. *This fact suggests the idea that the present governments must be destroyed, only in a manner that will prevent the organization or rise of any and all other governments, whether it be a government of three men or three hundred million.* No government can exist without a head, and by assassinating the head just as fast as a government head appears, the government can be destroyed, and by this same process all other governments can be kept out of existence.

“This is the policy of the nihilist of Russia, and the moment it gets any popular support throughout civilization, all governments will disappear forever. Those governments least offensive to the people should be destroyed last. All governments exist by the abridgment of human liberty, and the more government the less liberty. He, alone, is free, who submits to no government. All governments are domineering powers, and any domineering power is a natural enemy to all mankind, and ought to be treated as such.

“*Assassination will remove the evil from the face of the earth.*

“Man will always have and always need advisers, teachers and leaders in all departments of life, but bosses, jailers and drivers are unnecessary.

“Man’s leader is his friend. His driver is his enemy. This distinction should be understood, and the parties should be dealt with accordingly. *Assassination, properly applied, is wise, just, humane and brave. For freedom, all things are just.*”

June 27, 1885.—In the “Alarm” of this date appears the following, written by the defendant August Spies:

“Though everybody nowadays speaks of dynamite, that great force of civilization, some with awe, others with delight, it may be said that but few have any knowledge of the general

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character and nature of this explosive. For those who will, sooner or later, be forced to employ its destructive qualities in defence of their rights as men, and from a sense of preservation, a few hints may not be out of place.

"Dynamite may be handled with perfect safety, if proper care is used. It is a two-edged sword if handled by one who is not acquainted with its character. Dynamite, which is also known in the market as 'giant powder' and 'Herculean powder,' is a compound of nitro-glycerine and clay (China-clay is the best.) In many cases sawdust is used. It requires a practical chemist to mix nitro-glycerine with clay or sawdust, for it is a very dangerous piece of work. Revolutionists would do well to buy the dynamite ready made. It is very cheap—much cheaper than they can manufacture it for themselves. No. 1 is the best. No. 2 will do also. Dynamite can be purchased from any large powder concern in any of our cities.

"Dynamite explodes from heat and detonation. It is self-explosive at a temperature of 180 degrees (Fahrenheit), and through sudden and violent concussion, as, for instance, produced by the fulminate of silver or mercury. If you keep your stock of dynamite below a temperature of 100 degrees, and even 125, it will not explode itself. Yet you ought not expose it directly to the rays of the sun or get it too near the stove. The best way of storing it is: Wrap it well in oil paper, place it in a box of sawdust, and bury it in your cellar, garden, or where nobody can touch it. The moisture is neutralized by the sawdust. Never attempt to thaw frozen dynamite. This requires the skillful hand of a chemist, and is very dangerous.

"In handling dynamite, be careful not to get any of it on your lips, nose, eyes, or skin anywhere, for if you do, it will give you a terrible headache. When filling bombs, and you must handle it with your fingers, place a rubber mitten on your hand, and tie a handkerchief over mouth and nose, so

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that you may not inhale the dangerous gases. They likewise produce a frightful headache. In filling bombs, use a little wooden stick, and never be careless.

"Keep the stuff *pure!* Beware of sand. For the revolutionist, it is necessary that the revolutionist should experiment for himself. Especially should he practice the knack of throwing bombs.

"For further information, address A. S., 'Alarm,' 107 Fifth avenue, Chicago."

In the "Alarm" of July 25, 1885, is an article entitled, "STREET FIGHTING.—*How to Meet the Enemy.*—Some valuable hints for the revolutionary soldiers.—What an officer of the United States army has to say."

In the "Alarm," from August 17, 1885, to the last issue of that paper, appeared the following notice:

"The armed section of the American group meets Monday night, at 54 West Lake street."

September 5, 1885.—"Now, in regard to the proposed strike next spring, a few practical words to our comrades. The number of organized wage-workers in this country may be about 800,000; the number of the unemployed about 2,000,-000. Will the manufacturing kings grant the modest request under such circumstances? No, sir. The small ones can not, and the big ones will not. They will then draw from the army of unemployed. The strikers will attempt to stop them. Then comes the police and the militia. * * * *Say, workingmen, are you prepared to meet the latter—are you armed?*"

The following extract from "Bakunin's Groundwork for the Social Revolution," was published in the "Alarm," December 26, 1885:

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"A revolutionist's duty to himself:—

"1. The revolutionist is a self-offered man. He has no personal interest, feelings or inclinations; no property,—not even a name. Everything in him is consumed by one single interest, by one single thought, one single passion,—the *Revolution*.

"2. The whole work of his existence,—not only in words, but also in deeds,—*is at war with the existing order of society, and with the whole so-called civilized world. With its laws, morals and customs he is an uncompromising opponent. He lives in this world for the purpose to more surely destroy it.*

"3. The revolutionist despises every doctrine, and disclaims society in its present form. He leaves the re-organization of society to the future generations. *He knows only one science—the science of destruction.* He studies mathematics, physics, chemistry, and perhaps medicine, for, and *only* for, this purpose. For the same reason he studies, day and night, the living science of men, characters, conditions, and also the situation of the present social 'order.' *The quick and sure destruction of the present unreasonable order of the world is the object of these studies.*

"4. He despises public sentiment. He despises and hates the present social 'morality' in all its instigations and manifestations. He acknowledges as moral whatever favors the triumph of the revolution; immoral and criminal whatever checks it.

"5. The revolutionist is a consecrated being,—who does not belong to himself. *He would not spare the State in general, and the entire class society, and at the same time does not expect mercy for himself. Between him and society reigns the war of death or life, publicly and secretly, but always steady and unpardoning.* He has got to get used to standing all endurance.

"6. Stringent with himself, he must also be to others. All weak sentiment towards relation, friendship, love and thankfulness must be suppressed through the only cold passion of

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the revolutionary work. For him there exists only one benefit, one wager, one satisfaction,—the effect of the revolution. *Day and night dare he have only one thought,—one aim: The unmerciful destruction. While he, cold-blooded and without rest, follows that aim, he himself must be ready to die at any time, and ready to kill, with his own hands, any one who seeks to thwart his aim.* * * *

"The revolutionist's duty towards his revolutionary comrades:— * * *

"9. It is unnecessary to speak of the fellowship amongst the revolutionists. Upon them exists the entire might of the revolutionary work. Comrades of the revolution, who stand even high on the revolutionary understanding and revolutionary habit, must, as much as possible, consult all important affairs in common, and take resolution unanimously. *In executing a resolved-upon case, everybody must, as much as possible, depend upon himself. In case where a lot of destructive deeds is to be done, everybody must be self-operating, and request help and counsel of his comrades only in cases where it is absolutely necessary for success.*

"10. Every comrade of the revolution shall have several revolutionists in the second or third order, on hand,—that is, such persons as are not thoroughly instructed; he shall dispose of them as a trusted part of the revolutionary capital. He shall use his part of the capital economically, in order to get as great results from them as possible. He shall dispose of himself as so much capital to be used for the triumph of the work of the revolution, but a capital which he can not dispose of without the full consent of all the fully consecrated comrades. * * *

"The revolutionist's duty toward society:— * * *

"13. A revolutionist moves in the world of State, in the world of classes, in the so-called 'civilized' world, and lives in the same, just for the simple reason that he believes in its *speedy destruction*. He is no true revolutionist who clings to

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anything at all in this bourgeois world. He dare not shrink where the cause is at stake, or refuse to break any tie which binds him to the old world, or hesitate to destroy any institution or its upholders. Equally must he hate everything but that is anti-revolutionary. So much the worse for him if he has in the present world ties of relation, friendship or love. *He is no revolutionist if these ties are able to arrest his arm.*

"15. The entire filthy society of our times should be divided into different categories. *The first one consists of those who are immediately sentenced to death.* The members may make up lists of such delinquents, in a degree according to their rascality, and in regard to the effect of the revolutionary work, but so that the first numbers may be served before the rest.

"16. In making up these lists, and arranging the categories, the individual corruptionist dare not justify himself, or perhaps the hatery by which he is feared, to the members of the organization or the people, because corruption is useful when it is able to stir up a riot. The measure of usefulness is only to be considered, which may result from the death of a certain person for revolutionary work. *In the first place, those persons are to be destroyed who are most harmful to the revolutionary organization, and whose violent and sudden death is able to terrify the governments and shake their might the most, in so far as it will rob the powers that be, of their most energetic and intelligent agents.* * * *

"21. The sixth category is of importance. It is the women, who are to be divided into three classes: To the first belong the perfunctorious women, without intellect or heart, who are to be used in the same manner as the men in the third and fourth categories. To the second class belong the passionate, devoted and qualified women, who, although they do not belong to us, because they have not risen to the practical, praiseless, revolutionary comprehension, they must be handled as the men in the fifth category. In the third category are the women who are wholly consecrated to the social revolu-

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tion,—that is, they have accepted our whole programme. *They are to be regarded as the most valuable part of the revolutionary treasures, for without their assistance we are unable to achieve the social revolution.*"

March 20, 1886.—"Argument is no good unless based on force. You must be able to *make* your antagonist stand still and listen to your plea. When he refuses to do that, the use of force becomes a necessity."

April 3, 1886.—"American group," etc. "Mr. Parsons thought the organization of the vast body of unskilled and unorganized laboring men and women a necessity, in order that they formulate their demands and make an effective defence of their right. He thought the attempt to inaugurate the eight-hour system would break down the capitalistic system, and bring about such disorder and hardship that the social revolution would become a necessity. As all roads in ancient times led to Rome, so now all labor movements, of whatever character, inevitably lead to socialism." The unskilled laborers' eight-hour league was then organized, thirty joining.

April 24, 1886.—"Workingmen, to arms. War to the palace, peace to the cottage, and death to luxurious idleness. The wage system is the only cause of the world's misery.

"One pound of dynamite is better than a bushel of bullets. Make your demand for eight hours with weapons in your hands, to meet the capitalistic blood-hounds, police and militia in proper manner."

"Above hand-bill sent from Indianapolis, Indiana, as posted all over that city last week."

April 24, 1886.—

"KNAVES OR FOOLS?"

"In the contest now going on between labor and capital, the pretended leaders and official mouth-pieces of trades-unions and Knights of Labor assemblies are attempting to prevent

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the toiling masses from using the best, most effective and only successful means against the predatory beasts which must be exterminated as public enemies, during strikes and boycotts,—our only weapons against capitalistic conspiracy, and organized murder, starvation and wage-slavery. These flunkies and lickspittles speculate on their chances of securing places at the public crib as influential agitators, or as foremen and ‘sweaters’ over their fellow-workers, or some other sinecure. Others are tickled by the praises of the capitalistic press, and by being quoted as representative reformers, in interviews, etc. These enemies of labor manage to get themselves elected to trades assemblies and other representative bodies of organized labor, where they play the role of harmonizers and peacemakers between the despoiled wage-slaves and their despoilers. The toiling masses never gave Mr. Powderly or any other man the authority to issue a proclamation against the enforcement of the eight-hour law from and after May 1, nor has he been empowered by any plebiscite to forbid strikes and boycotts, and to preach the harmony of capital and labor, as against the gospel of discontent. The Knights of Labor, trade unionists, and other working people, repudiate, by their action, the foolish talk of such men. *The social war has come, and whoever is not with us is against us.*”

The following is an extract from the “Anarchist:”

“Motto: All government we hate. Organ of the autonomous group of the I. A. A. Volume 1. Chicago, January 1, 1886. No. 1. Complaints should be sent to G. Engel, 286 Milwaukee avenue. Call.—Workingmen and fellows: We recognize it our duty to contend against existing rule, but he who would war successfully must equip himself with all implements adapted to destroy his opponents and secure victory. In consideration thereof we have resolved to publish the ‘Anarchist,’ as a line in the fight for the disinherited. It is necessary to disseminate anarchistic doctrine. As we strive for freedom from gov-

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ernment, we advocate the principle of autonomy, in this sense : We strive towards the overthrow of the existing order, that an end may be put to the 'abhorrent work of destruction on the part of mankind, and fratricide may be done away.' The equality of all, without distinction of race, color or nationality, is our fundamental principle, thus ending rule and servitude. We reject reformatory endeavors, as useless play, adding to the miserable derision and oppression of the workingmen. Against the never-to-be-satisfied ferocity of the capital, we recommend the radical means of the present age. All endeavors of the working classes, not aiming at the overthrow of existing conditions of ownership, and at complete self-government, are to us reactionary," etc.

During the years 1885 and 1886 the defendants Fielden, Parsons, Engel, Spies and Schwab made numerous speeches to the workingmen. Schwab and Spies were generally together on these occasions, and an address by one was generally followed by an address by the other. At a gathering of workingmen at Mueller's Hall, in the North Division, in June, 1885, Schwab said in German, that the gap between the rich and poor was growing wider ; that, although despotism in Russia had endeavored to suppress nihilism, nihilism was still growing ; that the death of Reinsdorf, a man then recently executed in Europe, had been avenged by the killing of the chief of police of Frankfort, who had been industrious in endeavoring to crush out socialism ; that murder was forced on many a man through the misery brought on him by capital ; that freedom in Illinois was unknown ; that what was needed here was a bloody revolution, which would right their wrongs. The "Arbeiter Zeitung," in reporting this speech, quotes the concluding remark of Schwab as follows : "Because we know that the ruling class will never make any concessions, therefore we have, once for all, severed our connection with it, and made all preparations for a revolution by force."

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On February 15, 1886, Schwab made a speech at the Twelfth street Turner Hall, in regard to the London riots, which closed as follows: "We greet the London events as the announcement of the near approach of the social revolution."

At a mass meeting on the Lake Front on April 26, 1886, about a week before the Haymarket meeting, the defendant Schwab said: "To-day is Easter day. * * * The workingmen of Chicago to-day celebrate their resurrection. They are resurrected from their laziness,—from their indifference in which they have remained so long. * * * From the first of May we will work eight hours a day. The workingmen want this, and wanting it is having it, if the desire is based on power. The workingmen are powerful if they are united. * * * Therefore, also in future let us be a united, solid army. Unite with your unions! Never desert them! * * * *Everywhere police and murderers are employed to grind down workingmen. For every workingman who has died through the pistol of a deputy sheriff, let ten of those executioners fall. Arm yourselves. After the first of May, eight hours, and not a minute more.*"

Spies, in a speech at the Mueller Hall meeting, in June, 1885, advised the workingmen to revolt at once, and said, that he had been accused of giving this advice before, and that it was true, and that he was proud of it; that wage-slavery could only be abolished through powder and ball. He says that he was accused by a little paper to have called upon the workingmen to commit criminal acts. He conceded that, and repeated it again. What is crime, anyway? When the workingman was putting himself in the possession of the fruits of his labor, stolen from him, that was called a crime. A pseudo-opponent had remarked that he could bring about the emancipation of the working classes through the ballot. *This, however, was impossible. If the ballot had been of advantage to*

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the workingman, then Napoleon and Bismarck never would have given the franchise to the people. The ballot was serving only for the covering over of capitalistic tyranny and highway robbery. The speaker pointed out the miserable condition the coal-diggers in the Hocking Valley had gotten into, and in conclusion he gave his hearers the advice to frequently visit the meetings of the International Workingmen's Association, and to read the organs of the workingmen for the purpose of informing themselves.

At a meeting at Twelfth street Turner Hall, on October 11, 1885:

"Mr. August Spies was introduced at this point, and offered the following resolution :

"WHEREAS, a general move has been started among the organized wage-workers of this country for the establishment of an eight-hour work day, to begin May 1, 1886 ; and

"WHEREAS, it is to be expected that the class of professional idlers,—the governing class, who prey upon the bones and marrow of the useful members of society,—will resist this attempt by calling to their assistance the Pinkertons, the police and State militia : Therefore, be it

"Resolved, That we urge upon all wage-workers the necessity of procuring arms before the inauguration of the proposed eight-hour strike, in order to be in a position of meeting our foe with his own argument—force.

"Resolved, That while we are skeptical in regard to the benefits that will accrue to the wage-workers in the introduction of an eight-hour work day, we nevertheless pledge ourselves to aid and assist our brethren in this vast struggle with all that lies in our power, as long as they show an open and defiant front to our common enemy, the labor-devouring classes of aristocratic vagabonds, the brutal murderers of our comrades in St. Louis, Lemont, Chicago, Philadelphia and other places. Our war-cry may be, 'Death to the enemy of the human race—our despoilers.'

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"August Spies supposed that Mr. _____ did not like the terms in which members of the government were referred to. The reason of this was, that Mr. _____ was one of those political vagabonds himself. There were nine millions of people engaged in industrial trades in this country. There were but one million of them as yet organized, while there were two millions of them unemployed. *To make a movement in which they were engaged a successful one, it must be a revolutionary one.* Don't let us, he exclaimed, forget the most forcible argument of all,—the gun and dynamite."

At a meeting on the Lake Front, in July, 1885, the defendant Parsons made a speech. "He was speaking in a general way about trouble with the workingmen and the people, what he called the proletariat class, and spoke about their enemies, as he termed them,—*the police and the constituted authorities. He said that they were their enemies, and that they would use force against them. The authorities would use the police and the militia, and they would have to use force against them. He advised them to purchase rifles. If they hadn't money enough to buy rifles, to buy pistols; and if they couldn't buy pistols, they could buy sufficient dynamite for twenty-five cents to blow up a building the size of the Pullman building, and pointed to it.*"

At another meeting, in the same month, at the same place: "After the picnic Mr. Parsons—I won't be sure of that—spoke about a young German experimenting with dynamite at this picnic. He had dynamite in a can, a tomato can, and spoke of how the thing was thrown into a pond, or lake, and how much execution could be done with that amount of dynamite. He also spoke of what could be done with it in destroying buildings and property in the city."

At a meeting in Market square, in April, 1885, the defendant Parsons made a speech to a company of workingmen, in which he said: "It is no use of arguing,—we will never gain

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anything by argument and words. *The only way to convince these capitalists and robbers is to use the gun and dynamite.*"

At a meeting at Baum's Pavilion, on February 22, 1885, Parsons said, in a speech: "I want you all to unite together and throw off the yoke. We need no president, no congressmen, no police, no militia and no judges. They are all leeches, sucking the blood of the poor, who have to support them all by their labor. *I say to you, rise, one and all, and let us exterminate them all. Woe to the police or the militia whom they send against us.*"

At a meeting in April, 1885, of workingmen, for the purpose of denouncing the new board of trade, the defendant Parsons spoke as follows:

"The present social system makes private property, of the means of labor and the resources of life, capital; and thereby creates classes and inequalities, conferring upon the holders of property the power to live upon the labor product of the propertyless. Whoever owns our bread owns our ballots, for a man who must sell his labor or starve, must sell his vote when the same alternative is presented. The inequalities of our social system, its classes, its privileges, its enforced poverty and misery, arise out of the institution of private property, and so long as this system prevails, our wives and children will be driven to toil, while their fathers and brothers are thrown into enforced idleness, and the men of the board of trade, and all other profitmongers and legalized gamblers, who live by fleecing the people, will continue to accumulate millions at the expense of their helpless victims. This grand conspiracy against our liberty and lives is maintained and upheld by statute law and the constitution, and enforced by the military arms of the State. *If we would achieve our liberation from economic bondage, and acquire our natural right to life and liberty, every man must lay by a part of his wages, buy a Colt's navy revolver, (cheers, and 'That's what we want,')*

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a Winchester rifle, (a voice, 'And ten pounds of dynamite! we will make it ourselves,') and learn how to make and use dynamite. (Cheers.) Then raise the flag of rebellion, (cries of 'Bravo,' and cheers,) the scarlet banner of liberty, fraternity, equality, and strike down to the earth every tyrant that lives upon this globe. (Cheers, and cries of 'Vive la Commune.') Tyrants have no rights which we should respect. Until this is done you will continue to be robbed, to be plundered, to be at the mercy of the privileged few. Therefore, agitate for the purpose of organization, organize for the purpose of rebellion, for wage-slaves have nothing to lose but their chains. They have a world of freedom and happiness to win. (Cheers.)'

At a meeting in Greif's Hall, in August, 1885, referring to the late street car strike, the defendant Parsons made a speech, in which he said: "If but one shot had been fired and Bonfield had happened to be shot, the whole city would have been deluged in blood, and the social revolution would have been inaugurated."

At a meeting at Greif's Hall, on March 29, 1885, Fielden said that a few explosions in the city of Chicago would help the cause considerably. "There is the new board of trade,—a roost of thieves and robbers. We ought to commence by blowing that up."

At another meeting, at the same place, Fielden said: "It is a blessing that something has been discovered wherewith the workingman can fight the police and the militia with the Gatling guns."

At a meeting held at Ogden's Grove, June 7, 1885, Fielden said: "I want all to organize. Every workingman in Chicago ought to belong to our organization. It is of no use to go and beg of our masters to give us more wages or better times. When I say organize, I mean for you to use force. It is of no use for

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the working people to hope to gain anything by means of the ordinary weapons. Every one of you must learn the use of dynamite, for that is the power with which we hope to gain our rights."

In the fall of 1885, the defendant Fielden addressed a crowd on the Lake Front, in which he stated "that the workingmen, the laborers, were justified in using force to obtain that which was theirs, and which was withheld from them by the rich. That our present social system was not proper,—that an equality of possession should exist; and if the rich kept on withholding from the poor what was justly due to the poor, because they had earned it, *they should use force and violence. That force should be used against the rich, the wealthy, and the men who had means. That the existing order of society should be destroyed—annihilated—and as no other redress could be had peaceably, they were justified in using force and violence.*"

At a meeting of the American group, on the 2d of September, 1885, Fielden, in a speech, said: "It is useless for you to suppose that you can ever obtain anything in any other way than by force. You must arm yourselves, and prepare for the coming revolution."

At a public meeting, held in Twelfth street Turner Hall October 11, 1885, Fielden said: "The eight-hour law will be of no benefit to the workingman. *You must all organize and use force. You must crush out the present government, as by force is the only way in which you better your present condition.*"

On the 20th of December, at the same place, *Fielden said:* "All the crowned heads of Europe are trembling at the very name of Socialism, *and I hope soon to see a few Liskas (the man who murdered the chief of police of Frankfort and was hanged for it) in the United States, to put out of the way a few of the tools of capital.*"

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At a meeting at 106 Randolph street, on January 14, 1886, Fielden made a speech, in which he said: "It is quite true that we have lots of explosives and dynamite in our possession, and we will not hesitate to use it when the proper time comes. We care nothing either for the military or police, for these are in the pay of the capitalist."

On March 12, 1886, Fielden made a speech at Zepf's Hall, at the corner of West Randolph and Desplaines streets, in which he said: "We are told that we must attain our ends and aims by obeying law and order. Damn law and order! We have obeyed law and order long enough. The time has come for you, men, to strangle the law, or the law will strangle you."

At a meeting at the Twelfth street Turner Hall, the defendant Fielden, in a speech, said: "*The first of May will be our time to strike the blow, there are so many strikes, and there will be fifty thousand men out of work—that is to say, if the eight-hour law is a failure—if the eight-hour movement is a failure.*"

Henry Weinecke, a police officer, testified that some time in February, 1886, before he came on the police force, he heard the defendant Engel, at Timmerhoff's Hall, 703 Milwaukee avenue, address a meeting. The witness said: "I was standing in the door,—the door that goes in the hall from the saloon. I heard him *talking about buying revolvers for the police. He advised everybody—'every man wants to join them, to save up three or four dollars to buy revolvers to shoot every policeman down.'* He says he wants every workingman whom he could get, to join them, and then advise everybody you know—you save up three or four dollars to buy a revolver that was good enough for shooting policemen down, he said." The witness further stated that the hall at that meeting was crowded, and Engel spoke in German.

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Gustav Lehmann, a socialist, and a member of the Lehr und Wehr Verein, testifies that in January or February of this year, (1886) he heard the defendant *Engel* make a speech at Neff's Hall, 58 Clybourne avenue, before the assembly of workmen of the North Side, in which he said that *those who could not arm themselves, and who could not buy revolvers, should buy dynamite, that it was very cheap, and easily handled, and gave a general description of how bombs could be made,—how gas-pipes could be filled; that a gas-pipe was to be taken and a wooden block put into the end, and it was to be filled with dynamite; then the other end is also closed up with a wooden block, and old nails are tied around the pipe by means of wire; then a hole is bored into one end of it, and a fuse with a cap is put into that hole; that the nails should be tightened to the pipe, so that when it explodes there will be many pieces flying around; that gas-pipe could be found on the west side from the river, near the bridge.*

William Seliger, a member of the "International," testified that he heard Engel, one of the defendants, make a speech to the North Side group, in Neff's Hall, last winter, in which he said that every one should manufacture bombs for themselves; that pipes could be found everywhere, without any cost; that the pipes were to be closed up with wooden blocks, fore and aft, and that in one of the blocks was to be drilled a hole for the fuse and cap; that every workingman should arm himself with them; that they were cheap to be had, and were the best means against the police and capitalist.

Moritz Neff, who was the keeper of the hall known as "Thoeringer Hall," sometimes called "The Shanty of the Communists," and also called "Neff's Hall," testified that he heard Engel address a public meeting of the North Side group, at that place; that he addressed the meeting on general principles, and came around and wanted money for a new paper which they had started. It is called the "Anarchist." "It

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is a paper started by the North-west Side group and two of the South Side groups. He came there for the purpose of obtaining money in order to push the paper along. He said that the 'Arbeiter Zeitung' was not outspoken enough in those anarchistic principles; therefore, it was necessary to start something else, and for this purpose they started this paper. They distributed some of these papers around there, and after that he sat down. Later on he spoke again, and he gave a kind of history of revolutions in the old country, and stated that the nobility of France were only forced to give up their privileges by brute force; and then he stated that the slaveholders at the South had only liberated their slaves after being compelled by force by the Northern States, and therefore, he said, that the present wage-slavery would only be done away with by force also; and he advised them to arm themselves, and if guns were too dear for them, they should use cheaper means,—dynamite, or anything they could get hold of, to fight the enemy. He stated that in order to make bombs it was not necessary that they should be round; anything that was hollow inside would,—in the shape of gas-pipes, or something like that. * * * This was in the speech that he made. He sat down afterwards. It was customary to have a discussion after the speech was made, and anybody that wanted to ask the speaker a question could do so. That part of the speech I did not hear. I was in the saloon."

The following is a substantial abstract of the contents of Herr Most's book:

"Science of Revolutionary War.—Manual for instruction in the use and preparation of nitro-glycerine, dynamite, gun-cotton, fulminating mercury, bombs, fuses, poisons, etc., etc. By Johann Most, New York. Printed and published by the Internationale Zeitung Verein, (International News Co.) 167 William street.

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The substance of this treatise is as follows:

About the importance of modern explosives for the social revolution, present and future, nothing need be said. They will form a decisive element in the next epoch of the world's history. It is, therefore, natural that the revolutionists of all countries should be anxious to obtain these explosives, and learn to apply them practically. Too much time has been wasted, books are expensive, etc. Even explanations of learned treatises are unavailing. Persons attempting to experiment according to the instructions, met with results not encouraging. The matter was expensive, dangerous, etc.

Some, under experiment, have produced tolerable gun-cotton, and small quantities of nitro-glycerine converted into dynamite. But this was of small value, as with small quantities of dynamite little can be done, and it is expensive. For manufacture of dynamite on a large scale, an expensive outfit is required, and separate quarters. A private dwelling can not be used. Such a laboratory must be kept in a secluded spot, because of the stench, which would lead to discovery and ejection. We have not, however, abandoned experiments, but concluded that dynamite can not be successfully supplied by private manufacture, but must be obtained from professional manufacturers. Not an ounce of dynamite heretofore used has been manufactured by revolutionists, but obtained by them. Watchmen can not prevent the securing of a supply. Beside, it is now an article of commerce for many purposes, so that its obtainment can not be prevented. The purchase is easier and cheaper than private manufacture, and for this money is required. Dynamite factories may be confiscated. The purpose of this treatise is to publish the simplest methods for the manufacture of explosives, and to explain their use and effect. In this direction many mistakes have been made, attributable to ignorance. Dynamite may be exploded by a spark of fire, but it is not so usually, for when brought in contact with the flame, it

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usually burns without causing further effects. It is exploded by shock, and therefore must be handled carefully; explodes easier when frozen than not, and freezes a few degrees above zero, Reaumer. It will stand a high degree of heat without exploding. Moisture has no effect upon it, as the principal ingredient, nitro-glycerine, is greasy. The simplest and surest way to explode dynamite, is in the application of blasting cartridges, obtainable in all large houses dealing in blasting or shooting utensils. (Description of the cartridge given.) In important undertakings procure best quality of fuse, which looks like common twine, which should be guarded against moisture, by being soaked in tallow or tar, or incased in rubber. When explosion is desired from a distance, a wire and electric battery are preferable, but if only a few minutes are desired to get away, six or eight inches of fuse will answer, attached to a piece of touchwood. For a bomb only so much fuse required as can burn in the interval of throwing—six or eight inches is enough, determinable by experiment. To explode dynamite by fuse and percussion cartridge, the bomb or other vessel should be inclosed on all sides, with an opening through which the blasting cartridge may be introduced. The cartridge should reach into the explosive material, two-thirds of its length, but not let the fuse touch, for the fuse might set fire to the dynamite, and it might escape in flame through the orifice. When the fuse burns to the cartridge, it explodes the latter, and that, the dynamite. The fulminating cap should be tightly squeezed into the petard, to avoid dislocation. Before introducing the fuse into the cap, cut it off to make a fresh end. In important undertakings, the greatest care is advisable. The fulminating mercury rests loosely, and may fall out of the cartridge, which should therefore be examined before being used. The same rules obtain as to nitro-glycerine, but the latter is a more powerful explosive than dynamite, the latter consisting of seventy-five to eighty per cent of nitro-glycerine, and twenty to twenty-five per cent

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of charcoal, sawdust, or other proper material. On account of its rapidity, the greatest force of a dynamite explosion is in the direction where it meets the greatest resistance. No very heavy or very strong cylinder should be used to demolish a wall, but a simple tin can is preferable. But where dynamite is proposed to be exploded among a number of persons, the stronger the shell "the more splendid are the results."

The best shape for a bomb is globular, as furnishing equal resistance, and producing the same explosive effect in all directions. Iron shells are the best, obtainable in a foundry. Zinc globes are not to be despised, and can be privately manufactured; but the latter requires obtaining a brass mould from a trustworthy expert. With such a mould, fifty semi-globes of moderate size can be manufactured in a day, and these can be soldered together. Every bomb must have an opening, about three-quarters of an inch, through which to fill, provided with a screw top, to be put in after the filling is done, with a hole bored through the top, large enough to pass a detonating cap, which is connected with the fuse. After the bomb is filled with dynamite, it is screwed together, and then the fuse can be lighted and the bomb thrown. "A trial of such a bomb has had a most excellent result."

A zinc globe, four inches in diameter, filled with dynamite, was experimented with. The explosion was like a cannon shot, bursting a large flagstone into twenty pieces, scattering them ten to fifteen feet, making a hole two feet in the ground, and at thirty to forty feet distance, pieces of the shell were found, about the size of a revolver ball, and very ragged. If this bomb had been placed under the table of a gluttonous dinner party, or if it had been thrown, through a window, onto the table, what a beautiful effect it would have had.

Another method: A piece of gas or water-pipe, a few inches long. Cut a screw on each end, and cover with a screw cap, and for explosion, proceed as with the other bomb. Such missiles are easily manufactured, cheap, and against a crowd.

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must produce brilliant effects. No certainty of one bomb being successful,—may result only in broken windows, etc. Any ordinary house will resist such explosions, and in operating against houses, a different method must be pursued. Percussion primer bombs can be provided by making pyramid or other shaped shells, with a percussion cap on each side, so that when thrown, whichever side strikes will explode the cap; but these, if falling in soft ground, are ineffective. The cap must be secured tightly, so as not to fall off, and the detonating chamber closed at its bottom with fulminating mercury, and the space being filled with fine gunpowder,—a second explosive cap being placed at the bottom of the vent in the dynamite, which is to be used preferably. A bomb filled with fulminating mercury would have to have a very strong shell to be effective, and filling a bomb with fulminating mercury is dangerous, and the fulminate is more expensive than dynamite. Besides all which, the primer bombs described are more expensive and difficult of construction than a globular bomb. We are of opinion that the fuse construction (with detonating chamber) is more practical and reliable. The best construction for a bomb that will explode by concussion, is one in which is inserted a small glass tube, slightly bent, closed at each end by melting, and then inserted in a shell, so that the ends of the tube meet the opposite sides of the chamber. Around this inner tube is placed another tube full of a mixture of chlorate of potash and sugar, and around this combined tube the chamber is filled with dynamite, and the shell closed. When this bomb is thrown, the concussion breaks the glass tube, the sulphuric acid ignites the potash mixture, and the result is an explosion of the dynamite. In practical use, the power of dynamite is illustrated in mining blasts, etc., small quantities producing wonderful results, which are dependent upon the confinement of the dynamite. In attacking buildings, unless the dynamite can be introduced into the chimneys or other orifices, considerable

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quantity must be used to shake the building or bring it down. For ordinary buildings, nothing less than ten pounds will do, and for massive buildings, barracks, churches, etc., forty or fifty pounds may be required, and even then will not be effective unless skillfully placed. The explosive should be placed under or within a foundation, or close to the main wall, just above the ground, but not packed in a shell,—simply in tin cylinders, the length of the cylinder being proportionate to the breadth of the breach desired. Care must be taken not to break the fuse. Waterproof fuse may be had ready made.

Following are results of experiments by the War Department of Austria: Four pounds of dynamite, in a tin box, made a hole two feet by eighteen inches, in a one-foot brick wall; seven pounds made a hole thirteen by fifteen inches, in a two-foot brick wall; twenty-seven pounds made a hole fifteen feet square in a three-foot brick wall; forty-three pounds knocked down a brick wall three and a half feet thick. Good results were obtained by loading down the dynamite with sandbags of earth,—two pounds at the bottom of a wall, sunk in the earth and covered with a foot and a half of ground, shaking down seven feet of a wall eighteen inches thick; fourteen pounds of dynamite in two tin cylinders, each two feet long and three inches in diameter, made a breach in a wall six and one-half feet wide and seven feet high. In a foundation of a four-foot brick wall, three holes were dug, eight feet apart, and seven and one-half feet deep, and six pounds of dynamite, in a tin box, placed in each hole, and exploded simultaneously by electricity. The result was the demolition of the wall for a distance of twenty-five feet. As compared with dynamite, sixty pounds of gunpowder in tin boxes, exploded against a stone wall, produced no other effect than to blacken it, the damage to the wall being eight to ten times less, even when confined, than in the case of dynamite. In case of war, the destruction of bridges, etc., is important, and here, dynamite has been especially effective.

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As examples: Two pounds of dynamite in a tin box, exploded on a wrought iron plate two inches thick, tore a hole through the plate; twenty-six pounds of dynamite, in eight tin boxes, laid one on another, destroyed an iron single-track railroad bridge, pipe construction, securely built; seven pounds of dynamite, exploded near a railroad track, threw off one rail and splintered the second, destroying the nearest tie. A train following immediately, (perhaps imperial special,) might have "gone to the devil." Other experiments also mentioned.

To thaw dynamite, which freezes very easily, the best plan is to put the dynamite in a waterproof vessel into a larger one containing water. Frozen dynamite is dangerous when ignited, and may fail to explode if special pains are not taken. Failures should be avoided in revolutionary movements. It is cheapest to buy explosives, or confiscate them; but instruction given for manufacture, avoiding technical terms. Advises processes which we have tried successfully, the principles of operation resting on the method discovered by Ditmar, the New York dynamite manufacturer, but simpler.

To manufacture dynamite, there are mixed, first, two parts sulphuric acid with one of nitric acid; second, there is added one-eighth of the whole quantity of glycerine. Scientists have overstated the dangers of this manufacture, with the result, that on the part of revolutionists less nitro-glycerine has been manufactured than would otherwise have been. Sulphuric acid of at least forty-five degrees can be had of any wholesale druggist, in nine-pound bottles; nitric acid of at least sixty-six degrees, in seven-pound bottles. To eighteen pounds of sulphuric acid you need nine pounds of nitric acid and three and one-half pounds of glycerine. Mixing can be done in an iron pot, enameled, or in any porcelain or glazed vessel. In an outer vessel pour water till it reaches three-fourths of the height of the inner vessel, kept cold by the use of ice. Put the sulphuric acid into the inner vessel; add half the quantity of nitric acid, stirring with a glass rod, and pouring in

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slowly. To get rid of the offensive and unhealthy fumes, cover the mouth and the nose by a handkerchief, keep the windows open, and mix near or under an open flue. When the mixture is completed, cover with a piece of glass, and leave for fifteen to twenty minutes to cool off, the mixture causing a high degree of heat; then add the glycerine, stirring briskly with the glass rod while pouring. If yellowish-red fumes arise, indicating conflagration, stop pouring the glycerine, and stir more briskly, and afterwards resume the addition of the glycerine. After completing the mixture, stir for ten minutes or so; then lift out the inner vessel, containing the mixture, and pour it into the water in the outer vessel, slowly. A yellowish oil will settle to the bottom, which is nitro-glycerine. After some time, pour off the water. Then pour the nitro-glycerine, for further purification, into a bowl filled with good soda lye, stirring briskly, so as to cause all of the nitro-glycerine to come in contact with the lye; let settle and pour off the lye, when the nitro-glycerine can be bottled. Nitro-glycerine, in a natural state, being dangerous from concussion, it is desirable to manufacture the dynamite at once. To do this, take sawdust or pulverized charcoal, or a mixture equal parts powder, sugar, dust of saltpetre and wood pulp; put this material into a vessel, and pour on the nitro-glycerine, kneading it with a wooden ladle, to the consistency of a thick dough; pack in oil paper or tin boxes. Long-continued handling of dynamite with the bare hands, produces severe headache.

Gun-cotton is also an explosive, not much inferior to dynamite. To prepare it, take unglued cotton wadding, boil in soda lye, dry carefully, either in the air or upon hot iron plates or bricks. The cotton is then dipped in the mixture of acids (sulphuric and nitric,) and after being left until thoroughly saturated, is taken out, squeezed dry, but not with the hands, and is then put in a vessel with soda lye; after fifteen minutes again taken and squeezed out, which may be done with-

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the hand, and which is repeated two or three times, but each time in new warm water. Then the wadding must be dried by atmosphere,—not by hot material. It is not extensively used, because it ignites in warm sunshine. Use immediately after manufacture, or keep in water until required; and then dry and use. Unconfined gun-cotton burns without explosion, but is explosive when placed in cylindrical bombs and rammed in securely. It can be exploded by fire without concussion. It is not to be despised, because it is more easily manufactured than dynamite, and has an innocent appearance.

Gun-cotton saturated with nitro-glycerine results in nitro-gelatine, incredibly explosive, and far superior to dynamite; but its keeping on hand is dangerous, and the mixture should therefore immediately precede its contemplated use.

Near Washington the following experiment was recently made: By a dynamite gun, bombs were thrown containing eleven pounds of nitro-gelatine, two thousand feet against solid rock. One bomb tore a hole six feet deep and twenty-five feet in diameter in the rock, and ten tons of rock were cut loose and thrown in all directions, while stones from ten to twelve pounds were carried about half a mile. The spectators, nearly all military men from foreign countries, concurred that an ordinary vessel would be destroyed by the explosion of a single such bomb, while an ironclad receiving it in the side would thereby be disabled. Revolutionists can not manufacture dynamite cannon, (which are about forty feet long,) but they can make bombs and use ordinary slings. "That which reduces what had been solid rocks into splinters, may not have a bad effect in a court, or monopolists' ball room."

Fulminate of mercury is a powerful explosive, consisting of mercury, sulphuric acid and alcohol, equal weights, which must be mixed in a clean, glazed vessel, in cold water or ice, the mercury being first put into the vessel and the rest stirred in slowly, the acid being added first, and enough of it to se-

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cure the entire solution of the mercury; pour in the alcohol after cooling. The product, a gray substance, is then spread on tissue paper to dry, and a little potash is added to reduce the danger of explosion. It explodes at a temperature of 150 degrees. Silver may be substituted for mercury, giving a better product, but more expensive. Experimenting should be done with very small quantities, to begin with. Fulminate of mercury explodes under a spark, as, for instance, a gun cap and bombs charged with this explosive, explode by concussion, simply. In filling a bomb, great care must be taken, as no ramming or concussion is allowed, and the filling is therefore better done while the mixture is moist, and when it will settle into shape; but in this event the shell must be left open until completely dry. In closing the shell, care must be taken not to cause any spark or ignition, which would be followed by an explosion. In modern wars they do not confine themselves to explosives and weapons of any particular description, but are aimed to weaken the enemy by all means possible.

A particularly effective weapon is fire. For example, in Moscow, against Napoleon, and by the Prussians in France in 1870-71. Therefore, in a list of revolutionary war utensils the article serviceable for incendiary purposes must not be omitted. A very effective mixture is of phosphorus and bi-sulphide of carbon. Buy yellow phosphor, (which is always kept under water, and must never be touched with the bare hands, but taken from the containing bottle with a fork or stick,) put in a porcelain bowl full of water, and cut into portions about the size of a bean, under water. The phosphor must be kept in a bottle with a glass stopper, fitting air-tight. Fill a bottle with bi-sulphide of carbon, drop in the phosphor quickly, and close, then shake slowly until dissolved. The fluid is then ready for use, and if poured on rags will result in spontaneous combustion, after a time. Petroleum added, retards the combustible action, and may be used when one

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desires to make good his escape. Experiments with this mixture were made in France by detectives.

Another incendiary article is thus constructed: Take a tin fruit jar, remove the cover; cut a hole in the center of the cover, into which insert a medicine glass; then resolder the cover; pour in benzine; fill the medicine glass with gunpowder, and close with a stopper, passing a fuse through the stopper; light the fuse; the result is, after a time, the explosion of the powder, bursting the can and scattering the benzine blazing in every direction. A hundred men equipped with such implements, scattered through a city, could achieve more than twenty batteries of artillery, and the thing is easily made, and cheap.

There may be cases in which the revolutionist must abandon shelter, and sacrifice his own life in the warfare against the property-owning beast of society; but no revolutionist should unnecessarily endanger his own life. An unknown danger is the more terrible. Therefore, revolutionists should act singly, or in as small numbers as possible.

Owing to the failure of various attacks, the idea has been suggested to poison weapons used for assault; but this idea has never been carried out, owing to the expense and difficulty of procuring suitable poisons. The best substance for poisoning arms is curari, used by the South American Indians on their arrows. It is absolutely fatal, but is high-priced. A dagger red-hot, and hardened in a decoction of rose laurel, is fatal. Pulverized phosphor, mixed with gum-arabic, and applied to the weapon, is also fatal. So with verdigris. So as to cadaver poison and prussic acid. But poisons must always be prepared immediately before use, as they dissolve in the atmosphere and become innocuous.

The successful arming of the people can not be achieved by one definite procedure, but by utilizing all different circumstances. The best thing would be for organized workingmen throughout the civilized world to provide themselves with

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muskets and ammunition, and to thoroughly drill; but this is almost impossible, as the authorities would interfere with them, and throughout Europe even the purchase of weapons by the common people is made difficult, while secret purchase subjects to the charge of "constructive treason." In America every one has the constitutional right to arm, but the carrying of concealed weapons is prohibited, while, if carried openly, that also would soon be prohibited. That is not all. Hardly had a military organization been effected in Illinois, when the legislature passed a law allowing to march and drill, only the State organizations. A litigation has resulted, which is as yet undetermined. There is evidenced also among legislators, a disposition to prohibit dynamite, except for industrial purposes and national defence. The workingmen of America can not arm themselves unless they do it soon. If they arm themselves at once,—well. If not, it will soon be difficult or impossible, and "you will find yourselves defenceless and powerless in the face of a mob of murderers in uniform, armed to the teeth." The price of a watch would buy a fine breech-loader. We do not take much stock in the arming of organizations for several reasons, among others, that it will cause a great pressure upon those who are unwilling to join, which is in violation of the anarchistic principle, and dangerous to the existence of the organization. Besides which, it would involve great financial sacrifice to those who prefer to do nothing for the cause. Labor organizations should therefore content themselves with allowing arming by those who desire to do so. They may buy arms at wholesale, and retail to those who wish to purchase, on the installment plan, if necessary, at cost, thus saving expense, without trenching upon the assets of the society. Muskets are not the only desirable weapons. Good revolvers, daggers, poisons and firebrands are destined to be of immense service during a revolution. The modern explosives deserve attention first of all. Quantities of nitro-glycerine

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and dynamite, numerous hand grenades and blasting cartridges, should be at the disposal of the revolutionists, these things acting as the proletariats' substitute for artillery. These are particularly recommended to European revolutionists, as they can not buy rifles. "Taken all in all, our motto is: Proletarians of all countries, arm yourselves, arm yourselves, no matter what may happen. The hour of battle draws near."

Certain precautions should be adopted by the revolutionist if he wishes to address an associate in writing. He should use a fictitious address, which should be frequently changed, and its contents ought to be shaped with a view to the possibility of its falling into the wrong hand. He should never mention the true name of his confederates. Initials or nicknames are preferable. There should never be a communication, even to a comrade, of a fact which it is not necessary for him to know. Your right name should never be signed. The use of a cipher is not desirable, because it is a suspicious method and is very liable to detection. If used at all, the key to the cipher should be communicated only to one confederate. "All letters received, which bear secrets, should always be burned immediately after reading." Revolutionists should never retain things which would lead to detection, and should always be on guard against detectives and police. Neither through friendship, love or family ties should you talk unnecessarily. These rules apply particularly "to all enterprises that are directed against the prevailing disorder and its laws." If a revolutionary deed is proposed, it should not be talked about, but silently pursued. If assistance is indispensable, it may be chosen, but a misstep in this is fatal. The society of suspected persons should be carefully avoided, thus spies would be rendered harmless. Self-composure in arrest is essential. Only when the arrest can be successfully resisted should there be resort to it, or when it becomes a question of life and death. But if you are sure that the arrest is on suspicion, you protest energetically and submit

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quietly. To examinations by a judge, the revolutionist should submit only so far as he can prove an alibi. Admit nothing except what is proven. If all means of deliverance are exhausted, then the prisoner should defend his deed from the standpoint of the revolutionist and anarchist, and convert the defendant's seat into a speaker's stand. Shield your person as long as possible, but when you are irredeemably lost, use your respite for the propagation of your principles. We thus speak because we observe that even expert revolutionists violate its plainest rules.

Appendix.

We have received, from a layman, an essay presenting another means of preparing fulminate of mercury, which essay reads as follows: Use an ordinary retort; to precipitate the fumes, put the neck of the retort in water, put in five grains of mercury and fifty grains of nitric acid; after this has cooled, add sixty grains of best alcohol in small quantities, shaking the retort well while mixing; upon the neck of the retort put an india rubber tube, thirty or forty centimeters long, passing through a vessel filled with water; light an alcohol flame under the retort until the mixture begins to boil; the fulminate of mercury crystallizes; pour off the liquid residue; refine the fulminate in cold water several times, and then boil the water; spread on tissue paper to dry, in a high temperature; then close carefully to prevent absorbing moisture. Thus writes our correspondent.

As a substitute for a blasting cartridge, where the latter can not be conveniently obtained, cut a piece off the closed end of a metal penholder, say an inch and a half long, and fill this with the caps ordinarily used for toy pistols, stuffing them in, then add a fuse, and the cartridge is ready for use.

Pulverized seeds of stramonium, baked in almond or other cake, furnish an effective poison to be used against a spy, informer, minion of the law, or other scoundrel.

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Invisible ink is recommended for revolutionary correspondence. To mislead spies, write an ordinary letter, and then write with the invisible ink between the lines, or on the reverse pages, or send an old book and write on the blank pages, or write on the inside of paper wrappers. There are invisible inks which are developed by heat, but these are not recommended, as heat is always applied to suspicious correspondence, by the detectives. The chemical is preferable. If you write with nitrate of cobalt (invisible,) it becomes bluish if you spread oxalate of potash over it. Nitrate of copper made legible by spreading cyanide of potassium on. And so, if written with hydro-chlorate. There are still other methods, but enough has been suggested.

We speak now of Sprengel's acid and neutral explosives. Sprengel has found that hydro-carbons, mixed with vehicles, can be exploded by a cap, like dynamite. For instance, equal parts of carbolic acid, dissolved in nitric acid, gives an explosive. By the solution of carbolic in nitric acid, picric acid is produced; in the mixture, heating takes place, which should be cooled off. Mix the picric acid with nitric acid, and an explosive as strong as nitro-glycerine is produced, the proportions being 58.3 of picric acid to 41.7 of nitric acid. If, instead of carbolic acid, benzine is used, the result is nitro-benzole. Add nitric acid in the proportion of 71.92 to 28.08 nitric benzole, and you have an explosive. These various liquids can be utilized by absorbing them into chlorate of potash, moulded into suitable shapes, which can be exploded ordinarily by a percussion cap; but these preparations are not as handy as dynamite, and can be used only in glass, stone or iron shells, other shells being affected by the acid, but they are easier to produce than nitro-glycerine.

Prussic acid may be prepared as follows: Take thirty grains yellow prussiate of potash, twenty grains sulphuric acid, and forty grains of water; heat the mixture in a retort, and catch the fumes in a well-cooled receiver. It is desirable that the

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receiver should be bent, and furnished with water in its lower portion, through which the fumes must pass, thus aiding condensation. There must be a hollow globe to receive the accumulating prussic acid. It is very volatile, and, upon drying up, no poisonous substance remains. Avoid the escaping fumes. Proceed under a well-ventilated flue. Prussic acid is not useful for poisoning arms, but is for liquors,—looks like water, and smells and tastes like bitter almonds. May be preserved in the dark for a long time.

For combustion, we add the following suggestion: Take blotting paper, saturate it with the phosphor dissolved in carbon, as published recently in the "Freiheit," and put it in an unclosed envelope, with pulverized chlorate of potash. Close the letter, and in about a quarter of an hour, upon opening it, an explosion and intense blaze will ensue. These letters can be carried around and dropped, and be carried safely in an air-tight tin box. For large buildings, such as courts, etc., put the phosphor in a small box, that can be carried in the overcoat pocket, filling the lower part with tar, and the upper part with shavings, saturate with prepared phosphor, and add potash, nail on a lid carefully, bore a few holes to let in the air, and in the course of three or four hours an explosion will follow, and a fire.

Phosphor may be used as a fuse for dynamite, keeping it from the air until the box of dynamite is placed in the proper position, then raise the lid, letting the air to the fuse, and in due time an explosion will follow.

Platform International Association of Workingmen, published in the "Arbeiter Zeitung" during February, March and April, 1886:

The Declaration of Independence declares when a long train of abuses and usurpation, pursuing invariably the same object, evinces a design to reduce them (the people) under absolute despotism, it is their right,—it is their duty,—to

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throw off such government, and to provide new guards for their future security. Are we not too much governed, and is it not the time to practice this thought of Jefferson? Is our government anything but a conspiracy of the privileged classes against the people? Fellow-laborers, read the following declaration, which we issue in your interest, for humanity and progress:

The present order of society is based upon the spoliation of the non-property by the property owners. The capitalists buy the labor of the poor for wages, at the mere cost of living, taking all the surplus of labor. By machinery constantly reducing the volume of human labor, produces constantly increasing quantities of goods, whereby the competition of labor is increasing, and its price being reduced. Thus, while the poor are increasingly deprived the opportunities of advancement, the rich grow richer through increasing robbery. Only by rare and accidental opportunities can the poor become rich; avarice increases with wealth, and capitalists compete for the spoliation of the masses. In this struggle, the moderately wealthy succumb, while monopolists flourish, concentrating in their hands entire branches of industry, trade and commerce. Industrial and commercial crises follow, which force the wretchedness of the non-property owners to the highest point. Statistics of the United States show, that after deducting raw material, interest on capital, etc., property-owners claim five-eighths, and allow to the laborers but three-eighths of the residue. The result of the present system is recurring over-production, while the increasing elimination of labor from the process of production brings the impoverishment of an increasing percentage on non-property owners, "who are driven into crime, vagabondage, prostitution, suicide, starvation and manifold ruin. This system is unjust, insane and murderous." Therefore, those who suffer under it, and do not wish to be responsible for its continuance, ought to strive for its destruction by all means and with their

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utmost energy. "In its place is to be put the true order of society. This can be brought about only when all instruments of property,—all capital produced by labor,—has been transformed into common property, for thus only is the possibility of spoliation cut off. Only by the impossibility of accumulating private capital can every one be compelled to work who claims the right to live. Neither lordship nor servitude will thereafter exist. This system would result further, that no one would need to work more than a few hours a day, and yet every reasonable want of society would be satisfied. In this way, time and opportunity are also given for opening to all the people the possibility of the highest imaginable culture."

Opposed to such a system are the political organizations of the capitalists, whether monarchies or republics. States are in the hands of property owners, with no other apparent end than to maintain the disorder of the present day. The laws turn their sharp points against the laboring people, and, so far as they seem otherwise, are evaded by the ruling class. The school exists for the offspring of the rich, while the children of the poor receive scarcely an elementary education, and this directed to promote conceit, prejudice, servility,—anything but intelligence. By reference to a fictitious heaven the church seeks to make the masses forget the loss of paradise on earth, while the press takes care to confuse the public mind. These institutions aim to prevent the people from reaching intelligence, being under the sway of the capitalist class. The laborers can look for aid from no outside source in their fight against the existing system, but must achieve deliverance through their own exertions. Hitherto, no privileged class have relinquished tyranny, nor will the capitalists of to-day forego their privilege and authority without compulsion. This is evidenced by the brutal resistance always manifested by the middle classes against all efforts by the laboring classes for their advancement. It is therefore evi-

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dent that the fight must be of a revolutionary character—that wage conflicts can not lead to the goal. Every reform in favor of the laboring classes involves a curtailment of the privileges of the rich, to which we can not expect their assent. “The ruling classes will not voluntarily relinquish their prerogatives, and will make no concession to us. Under all these circumstances, there is only one remedy left—force.” Our ancestors of 1776 have taught us that resistance to tyrants is justifiable, and have left us an immortal example. By force, they freed themselves from foreign oppressors, “and through force their descendants must free themselves from domestic oppression.” Therefore, it is your right and duty to arm, says Jefferson. Agitation to organize, organizations for the purpose of rebellion,—this is the course if the workingmen would rid themselves of their chains. And since all governments combine in their policy of oppression, it is evident that the victory of the laboring population can be confidently expected only when the wage-workers along the whole line of capitalistic society inaugurate the decisive combats simultaneously. Hence the necessity for international affiliation and the organization of the International Association of Workingmen. Our platform is simple and clear:

First—Destruction of existing class denomination, through inexorable revolution and international activity.

Second—The building of a free society on communistic organizations or production.

Third—Free exchange of equivalent products through the productive organization, without jobbing and profit making.

Fourth—Organization of the educational system upon non-religious and scientific and equal basis for both sexes.

Fifth—Equal rights for all, without distinction of sex or race.

Sixth—The regulation of public affairs through agreements between the independent communes and confederacies.

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The letter referred to as Most's letter, was offered in evidence by the State. A translation of the letter, dated 1884, was read, as follows:

"*Dear Spies*—Are you sure that the letter from the Hocking Valley was not written by a detective? In a week I will go to Pittsburg, and I have an inclination to go also to the Hocking Valley. For the present I send you some printed matter. There Sch. 'H' also existed but on paper. I told you this some months ago. On the other hand, I am in a condition to furnish 'medicine,' and the 'genuine' article at that. Directions for use are perhaps not needed with these people. Moreover, they were recently published in the 'Fr.' The appliances I can also send. Now, if you consider the address of Buchtell thoroughly reliable, I will ship twenty or twenty-five pounds. But how? Is there an express line to the place, or is there another way possible? Paulus, the Great, seems to delight in hopping around in the swamps of the N. Y. V. Z. like a blown-up (bloated) frog. His tirades excite general detestation. He has made himself immensely ridiculous. The main thing is only that the fellow can not smuggle any more rotten elements into the newspaper company than are already in it. In this regard, the caution is important to be on the minute. The organization here is no better nor worse than formerly. Our group has about the strength of the North Side group in Chicago,—and then, besides this, we have also the soc. rev. 6. 1, the Austrian League and the Bohemian League,—so to say, three more groups. Finally, it is easily seen that our influence with the trade organizations is steadily growing. We insert our meetings in the Fr., and can not notice that they are worse attended than at the time when we got through, weekly, \$1.50 to \$2 into the mouth of the N. Y. V. Z. Don't forget to put yourself into communication with Drury in reference to the English organ. He will surely work with you much and well. Such a paper is more necessary as to truth. This,

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indeed, is getting more miserable and confused from issue to issue, and in general is whistling from the last hole. Enclosed is a flyleaf, which recently appeared at Emden, and is perhaps adapted for reprint. Greeting to Schwab, Rau and to you.

Yours, JOHANN MOST.

"P. S.—To Buchtel I will, of course, write for the present only in general terms.

"A. Spies, No. 107 Fifth avenue, Chicago, Illinois."

A translation of postal card referred to, was as follows:

"L. S. (*Dear Spies*)—I had scarcely mailed my letter yesterday, when the telegraph brought news from H. M. One does not know whether to rejoice over that or not. The advance is in itself elevating. Sad is the circumstance that it will remain local, and, therefore, might not have a result. At any rate, these people make a better impression than the foolish voters on this and the other side of the ocean. Greetings and a shake.

Yours, J. M."

The following are among the instructions given for the prosecution :

"4. The court further instructs the jury, as a matter of law, that if they believe, from the evidence in this case, beyond a reasonable doubt, that the defendants, or any of them, conspired and agreed together, or with others, to overthrow the law by force, or to unlawfully resist the officers of the law, and if they further believe, from the evidence, beyond a reasonable doubt, that in pursuance of such conspiracy and in furtherance of the common object, a bomb was thrown by a member of such conspiracy at the time, and that Matthias J. Degan was killed, then such of the defendants that the jury believe, from the evidence, beyond a reasonable doubt, to have been parties to such conspiracy, are guilty of murder, whether present at the killing or not, and whether the identity of the person throwing the bomb be established or not.

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"5. If the jury believe, from the evidence, beyond a reasonable doubt, that there was in existence in this county and State, a conspiracy to overthrow the existing order of society, and to bring about social revolution by force, or to destroy the legal authorities of this city, county or State by force, and that the defendants, or any of them, were parties to such conspiracy, and that Degan was killed in the manner described in the indictment, that he was killed by a bomb, and that the bomb was thrown by a party to the conspiracy, and in furtherance of the objects of the conspiracy, then any of the defendants who were members of such conspiracy at that time, are in this case guilty of murder,—and that, too, although the jury may further believe, from the evidence, that the time and place for the bringing about of such revolution or the destruction of such authorities had not been definitely agreed upon by the conspirators, but was left to them and the exigencies of time, or to the judgment of any of the co-conspirators.

"5½. If these defendants, or any two or more of them, conspired together, with or not with any other person or persons, to excite the people or classes of the people of this city to sedition, tumult and riot, to use deadly weapons against and take the lives of other persons, as a means to carry their designs and purposes into effect, and in pursuance of such conspiracy, and in furtherance of its objects, any of the persons so conspiring, publicly, by print or speech, advised or encouraged the commission of murder, without designating time, place or occasion at which it should be done, and in pursuance of, and induced by such advice or encouragement, murder was committed, then all of such conspirators are guilty of such murder, whether the person who perpetrated such murder can be identified or not. If such murder was committed in pursuance of such advice or encouragement, and was induced thereby, it does not matter what change, if any, in the order or condition of society, or what, if any,

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advantage to themselves or others, the conspirators proposed as the result of their conspiracy; nor does it matter whether such advice and encouragement had been frequent and long-continued or not, except in determining whether the perpetrator was or was not acting in pursuance of such advice or encouragement, and was or was not induced thereby to commit the murder. If there was such conspiracy as in this instruction is recited, such advice or encouragement was given, and murder committed in pursuance of and induced thereby, then all such conspirators are guilty of murder. Nor does it matter, if there was such a conspiracy, how impracticable or impossible of success its end and aims were, nor how foolish nor ill-arranged were the plans for its execution, except as bearing upon the question whether there was or was not such conspiracy.

"6. The court instructs the jury that a conspiracy may be established by circumstantial evidence, the same as any other fact, and that such evidence is legal and competent for that purpose. So as to whether an act which was committed was done by a member of the conspiracy, may be established by circumstantial evidence, whether the identity of the individual who committed the act be established or not; and, also, whether an act done was in pursuance of the common design may be ascertained by the same class of evidence; and if the jury believe, from the evidence in this case, beyond a reasonable doubt, that the defendants, or any of them, conspired and agreed together, or with others, to overthrow the law by force, or destroy the legal authorities of this city, county or State by force, and that in furtherance of the common design, and by a member of such conspiracy, Matthias J. Degan was killed, then these defendants, if any, whom the jury believe, from the evidence, beyond a reasonable doubt, were parties to such conspiracy, are guilty of the murder of Matthias J. Degan, whether the identity of the individual doing the killing

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be established or not, or whether such defendants were present at the time of the killing or not.

"11. The rule of law which clothes every person accused of crime with the presumption of innocence, and imposes upon the State the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty of crime, to escape, but is a humane provision of law, intended, so far as human agencies can, to guard against the danger of any innocent person being unjustly punished.

"12. The court instructs the jury, as a matter of law, that in considering the case the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

"13. The court further instructs the jury, as a matter of law, that the doubt which the juror is allowed to retain on his own mind, and under the influence of which he should frame a verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror, in view of the consequences of his verdict, is not a reasonable doubt, and a juror is not allowed to create sources or materials of doubt by resorting to trivial and fanciful suppositions and remote conjectures as to possible states of fact differing from that established by the evidence. You are not at liberty to disbelieve as jurors, if, from the evidence, you believe as men. Your oath imposes on you no obligation to

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doubt, where no doubt would exist if no oath had been administered.

"13½. The court instructs the jury, that they are the judges of the law, as well as the facts, in this case, and if they can say, upon their oaths, that they know the law better than the court itself, they have the right to do so; but before assuming so solemn a responsibility, they should be assured that they are not acting from caprice or prejudice, that they are not controlled by their will or their wishes, but from a deep and confident conviction that the court is wrong and that they are right. Before saying this, upon their oaths, it is their duty to reflect whether, from their study and experience, they are better qualified to judge of the law than the court. If, under all the circumstances, they are prepared to say that the court is wrong in its exposition of the law, the statute has given them that right.

"14. In this case the jury may, as in their judgment the evidence warrants, find any or all of the defendants guilty, or not, or all of them not guilty; and if, in their judgment, the evidence warrants, they may, in case they find the defendants, or any of them, guilty, fix the same penalty for all the defendants found guilty, or different penalties for the different defendants found guilty. In case they find the defendants, or any of them, guilty of murder, they should fix the penalty either at death, or at imprisonment in the penitentiary for life, or at imprisonment in the penitentiary for a term of any number of years, not less than fourteen."

The following instructions, among others, asked by the defendants, were refused by the court:

"3. The court instructs the jury, that in order to convict these defendants, they must not only find that they entered into an illegal conspiracy, and that the Haymarket meeting was an unlawful assembly in aid of said conspiracy, but that in addition thereto, the bomb by which Officer Degan lost his life was cast by a member of said conspiracy in aid

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of the common design, or by a person outside of said conspiracy, aided and advised by all or some one of these defendants; but, in any event, should you find such a conspiracy, from the evidence, to have been in existence, any one or more of these defendants not found, beyond a reasonable doubt, to have been a member thereof, and who is or are not proved, beyond a reasonable doubt, to have been present at the Haymarket meeting, or who, if present, did not knowingly counsel, aid or abet the throwing of the bomb by which Officer Degan lost his life, such defendant or defendants you are bound to acquit.

"8. If the jury believe, from the evidence, that the defendants, or any one of them, entered into a conspiracy to bring about a change of government for the amelioration of the condition of the working classes, by peaceable means, if possible, but, if necessary, to resort to force for that purpose, and that, in addition thereto, in pursuance of that object, the Haymarket meeting was assembled by such conspirator or conspirators to discuss the best means to right the grievances of the working classes, without any intention of doing any unlawful act on that occasion, and, while so assembled, the bomb by which Officer Degan lost his life was thrown by a person outside of said conspiracy, and without the knowledge and approval of the defendant or defendants so found to have entered into said conspiracy, then, and in that case, the court instructs the jury that they are bound to acquit the defendants.

"9. The court instructs the jury, that it is not enough to find that the defendants unlawfully conspired to overthrow the present form of government, and that the Haymarket meeting was an unlawful assembly, called by these defendants in furtherance of that conspiracy, but you must find, in addition thereto, that the bomb by which Officer Degan lost his life was thrown by a member of said conspiracy, in aid of the common design; or, if you should find that it was

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thrown by a person not proved, beyond a reasonable doubt, to have been a member of said conspiracy, then you must find that these defendants knowingly aided and abetted or advised such bomb-thrower to do the act, otherwise you are bound to acquit them.

"11. The court further instructs the jury, that unless you find, from the evidence, beyond all reasonable doubt, that there was a conspiracy existing, to which the defendants or some of them were parties, and that the act resulting in the death of Matthias J. Degan was done by somebody who was a party to said conspiracy, and in pursuance of the common design of said conspiracy, you must find the defendants not guilty, unless the evidence convinces you, beyond all reasonable doubt, that the defendants, or any of them, personally committed the act resulting in the death of Matthias J. Degan, as charged in the indictment, or that the defendants, or any of them, stood by and aided, abetted or assisted, or, not being present, had advised, aided, encouraged or abetted the perpetration of the crime charged in the indictment, and then you should find guilty only those defendants as to whom the evidence satisfies you, beyond all reasonable doubt, that they thus committed or aided in the commission of the crime charged in the indictment.

"13. The court further instructs the jury, that under the constitution of this State it is the right of the people to assemble, in a peaceable manner, to consult for what they believe to be the common good, and that so long as such meeting is peaceably conducted, orderly, and not tending to riot or a breach of the peace, no official or authority has or can have any legal right to attempt the dispersal thereof in a forcible manner. Such attempt, if made, would be unwarranted and illegal, and might legally be resisted with such necessary and reasonable degree of force as to prevent the consummation of such dispersal. If the jury believe, from the evidence in this cause, that the meeting of May 4, 1886, was called for a

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legal purpose, and, at the time it was ordered to disperse by the police, was being conducted in an orderly and peaceable manner, and was about peaceably to disperse, and that the defendants, or those participating in said meeting, had, in connection therewith, no illegal or felonious purpose or design, then the order for the dispersal thereof was unauthorized, illegal, and in violation of the rights of said assembly and of the people who were then gathered. And if the jury further believe, from the evidence, that the meeting was a quiet and orderly meeting, lawfully convened, and that the order for its dispersal was unauthorized and illegal, under the provisions of the constitution of this State referred to, and that upon such order being given, some person in said gathering, without the knowledge, aid, counsel, procurement, encouragement or abetting of the defendants, or any of them, then or theretofore given, and solely because of his own passion, fear, hatred, malice or ill-will, or in pursuance of his view of the right of self-defence, threw a bomb among the police, wherefrom resulted the murder or homicide charged in the indictment, then the defendants would not be liable for the results of such bomb, and your verdict should be not guilty.

"18. Although certain of the defendants may have advised the use of force in opposition to the legally constituted authorities, or the overthrow of the laws of the land, yet, unless the jury can find, beyond all reasonable doubt, that they specifically threw the bomb which killed Degan, or aided, advised, counseled, assisted or encouraged said act, or the doing of some illegal act, or the accomplishment of some act, by illegal means, in the furtherance of which said bomb was thrown, you should return said defendants not guilty.

"22. The fact, if such is the fact, that the defendant Neebe circulated or distributed or handled a few copies of the so-called Revenge Circular, and, while doing so, said, substantially, 'Six workmen have been killed at McCormick's, last night, by the police; perhaps the time will come when it

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may go the other way,' is not of itself sufficient to connect him with the killing of Degan; nor is the fact that he had in his house a red flag, a gun, a revolver and a sword, sufficient, even when taken together with the other statement contained in this instruction, to connect said Neebe with the act which resulted in the death of Degan, as charged in this indictment.

"23. There has not been introduced any evidence in this case, to either show that the defendant Neebe, by any declaration, either spoken or written, has advised or encouraged the use of violence or the doing of any act in any way connected with the offence at the Haymarket, at which Degan was killed, nor is there any evidence that he was engaged at any time in any conspiracy to do any unlawful act, or the doing of any act in an unlawful manner, in the furtherance of which said Degan was killed, and, therefore, the State has not established any case as against the defendant Neebe, and you are therefore instructed to render a verdict of not guilty as to him.

"24. The jury are instructed to return a verdict of not guilty as to the defendant Neebe."

Upon the conclusion of the reading of the instructions in behalf of the defendants, which were read after the instructions on behalf of the People, the court, of its own motion, gave to the jury the following instruction:

"The statute requires that instructions by the court to the jury shall be in writing, and only relate to the law of the case. The practice, under the statute, is, that the counsel prepare, on each side, a set of instructions and present them to the court, and, if approved, to be read by the court as the law of the case. It may happen, by reason of the great number presented, and the hurry and confusion of passing on them in the midst of the trial, with a large audience to keep in order, that there may be some apparent inconsistency in them, but, if they are carefully scrutinized, such inconsistencies will probably disappear. In any event, however, the

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gist and pith of all is, that if advice and encouragement to murder was given, if murder was done in pursuance of and materially induced by such advice and encouragement, then those who gave such advice and encouragement are guilty of the murder. Unless the evidence, either direct or circumstantial, or both, proves the guilt of one or more of the defendants upon this principle, so fully that there is no reasonable doubt of it, your duty to them requires you to acquit them. If it does so prove, then your duty to the State requires you to convict whoever is so proved guilty. The case of each defendant should be considered with the same care and scrutiny as if he alone were on trial. If a conspiracy, having violence and murder as its object, is fully proved, then the acts and declarations of each conspirator, in furtherance of the conspiracy, are the acts and declarations of each one of the conspirators. But the declarations of any conspirator before or after the 4th of May, which are merely narrative as to what had been or would be done, and not made to aid in carrying into effect the object of the conspiracy, are only evidence against the one who made them. What are the facts and what is the truth, the jury must determine from the evidence, and from that alone. If there are any unguarded expressions in any of the instructions, which seem to assume the existence of any facts, or to be any intimations as to what is proved, all such expressions must be disregarded, and the evidence only looked to to determine the facts."

The following was the instruction given as to the form of the verdict:

"If all of the defendants are found guilty the form of the verdict will be: 'We, the jury, find the defendants guilty of murder in manner and form as charged in the indictment, and fix the penalty' If all are found not guilty the form of the verdict will be: 'We, the jury, find the defendants not guilty.' If part of the defendants are found

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guilty and part not guilty, the form of the verdict will be: 'We, the jury, find the defendant or defendants (naming him or them) not guilty; we find the defendant or defendants (naming him or them) guilty of murder in manner and form as charged in the indictment, and fix the penalty'"

Mr. LEONARD SWETT, for the plaintiffs in error:

The admission of the letter of Most to Spies was error, being the result of a violation of the law in relation to cross-examination. It was also obtained by an unlawful search, and was the act of a stranger. An unanswered letter, even when found in a party's possession, addressed to him, is inadmissible, unless acted upon by him. *Gifford v. People*, 87 Ill. 210; *Commonwealth v. Edgerly*, 10 Allen, 187; Wharton on Crim. Law, (9th ed.) secs. 644, 682.

A party is protected against unreasonable searches, (Const. of U. S. art. 4 of amendments,) and against being compelled to testify against himself in a criminal case. *Id. art. 5; Boyd v. United States*, 116 U. S. 616; *Entic v. Carrington*, 19 Howell's State Trials, 1029; *Watts v. State*, 5 W. Va. 532.

When the common enterprise is ended by accomplishment or abandonment, no subsequent act or declaration of one conspirator is admissible against the others. Wharton on Crim. Evidence, sec. 699; *People v. Stanley*, 47 Cal. 112; *Commonwealth v. Thompson*, 99 Mass. 444; *State v. Westfall*, 49 Iowa, 328; *Strady v. State*, 5 Coldw. 300; *State v. Fuller*, 39 Vt. 74; *Hunter v. Commonwealth*, 7 Gratt. 641; *Hudson v. Commonwealth*, 2 Duv. 531; *Reuben v. State*, 25 Ohio St. 464; *People v. Stephens*, 47 Mich. 411; *People v. Arnold*, 46 id. 68; *Spencer v. State*, 31 Texas, 64; *Abe v. State*, id. 416; *Commonwealth v. Ingraham*, 7 Gray, 46; *Ormsbee v. People*, 53 N. Y. 472; *Morris v. State*. 50 Ohio St. 439.

It is necessary to prove the union of the minds conspiring, or the conspiracy; first, and then the acts and declarations of each become those of all so conspiring. Roscoe on Crim.

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Evidence, (7th Am. ed.) 417, sec. 416; 1 Greenleaf on Evidence, sec. 111; 1 Starkie on Evidence, *342; Kylling's Crown Cases, *24.

One crime can not be established by proof of another crime. Wharton on Crim. Law, sec. 30; *Schaffner v. Commonwealth*, 72 Pa. St. 60; *Kribs v. People*, 82 Ill. 424; *Watts v. State*, 5 W. Va. 532.

The erroneous introduction of illegal evidence is not cured by its subsequent exclusion. (*Howe v. Rosine*, 87 Ill. 105.) In a capital case, no evidence should be admitted which does not prove or tend to prove the guilt of the defendant. *Devine v. People*, 100 Ill. 290; *Sutton v. Johnson*, 62 id. 209; 1 Phillips on Evidence, (5th Am. ed.) 765, 766, p. 644; *Kinchillow v. State*, 5 Humph. 9; *Wiley v. State*, 3 Coldw. 362.

After a conspiracy, it is only acts and declarations done and expressed in furtherance of the common design which are admissible. *People v. Stanley*, 47 Cal. 113; *State v. George*, 7 Ind. 321; *Rex v. Hardy*, 25 State Trials, 1.

Mr. W. P. BLACK, and Messrs. SALOMON & ZEISLER, also for the plaintiffs in error:

Mere participation in an unlawful assembly does not make one responsible for the independent crime of a participant. 1 Wharton on Crim. Law, secs. 220, 397; 1 Bishop on Crim. Law, secs. 633, 634, 641; *Regina v. Skeet*, 4 Foster & Fin. N. P. Cases, 931; *Rex v. Hawkins*, 3 Carr. & Payne, 392; 1 Curw. Hawk. 101; 1 Russell, 652; *Hodgson case*, 1 Leach, 6 S. P.; *Rex v. White*, Russ. & Ry. C. C. 99; *Rex v. Collison*, 4 Carr. & Payne, 565; *Regina v. Price*, 8 Cox's C. C. 96; *Duffey's case*, 1 Lewin's C. C. 194; *Regina v. Luck*, 3 Foster & Fin. N. P. Cases, 483; *State v. Hildreth*, 9 Ired. L. 440; *White v. People*, 81 Ill. 333; *United States v. Jones*, 3 Washb. C. C. 209.

To hold one as an accessory on the ground of a conspiracy, the principal actor must be identified as a co-conspirator.

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Wharton on Crim. Evidence, sec. 325; *Ogden v. State*, 12 Wis. 553; *Hatchett v. Commonwealth*, 75 Va. 925; *Jones v. State*, 64 Ga. 697.

The crime charged must be within the purview of such conspiracy, and committed in its furtherance. *State v. Lucas*, 55 Iowa, 321; *Watts v. State*, 5 W. Va. 532; *State v. Absence*, 4 Porter, 397; 4 Blackstone's Com. 23; 3 Greenleaf on Evidence, secs. 44, 50; 1 Wharton on Crim. Law, sec. 647.

It is error for the court to suggest, in the hearing of the jury, an hypothesis not supported by the evidence. *State v. Harkin*, 7 Nev. 382; *Hair v. Little*, 28 Ala. 236; *Andrews v. Ketcham*, 77 Ill. 377.

By cross-examining Spies as to matters not covered by his direct testimony, improper evidence was elicited, and he was thus compelled to give testimony against himself. This was a fatal error. *Gifford v. People*, 87 Ill. 210.

There can be no criminal responsibility for the act of an associate in purpose, but not in action. 2 Starkie on Evidence, pt. 1, *324; *State v. Price*, 88 N. C. 627.

A distinct crime, unconnected with that charged in the indictment, can not be given in evidence. *Schaffer v. Commonwealth*, 72 Pa. St. 60; Wharton on Crim. Evidence, sec. 30; *Kribs v. People*, 82 Ill. 424; *Derine v. People*, 100 id. 290; *Sutton v. Johnson*, 62 id. 209; 1 Phillips on Evidence, (5th Am. ed.) 765, 766, p. 644; Roscoe on Crim. Evidence, sec. 90, p. 90; *Kinchillow v. State*, 5 Humph. 9; *Wiley v. State*, 3 Coldw. 362.

A *prima facie* conspiracy must be established, before the acts and declarations of an alleged co-conspirator can be evidence against another. *State v. George*, 7 Ired. 321; Roscoe on Crim. Evidence, (7th Am. ed.) 416, secs. 417, 418; 1 Greenleaf on Evidence, sec. 111.

Before one can be convicted as an accessory, the guilt of the principal must be alleged, and proved on the trial. See 1 Wharton on Crim. Law, sec. 237; *State v. Ricker*, 29 Me.

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84; *Baxter v. People*, 2 Gilm. 578; Bishop on Crim. Law, sec. 71; Wharton on Crim. Evidence, sec. 325; *State v. Crank*, 13 S. C. (L. R.) 86; *Holmes v. Commonwealth*, 25 Pa. St. 221; *Regina v. Howell*, 9 C. & P. 437; *Fairlee v. People*, 11 Ill. 5; *Ritzman v. People*, 110 id. 362.

A known party can not be indicted as unknown, and if an indictment against an accessory states the principal to be unknown, contrary to the fact, no conviction can be had. Wharton on Crim. Pl. and Pr. sec. 112; Wharton on Crim. Evidence, sec. 97; *Geiger v. Steele*, 5 Iowa, 484; 2 East's Crown Law, 651, 781; *Simmons v. State*, 4 Ga. 465; *Moore v. State*, 65 Ind. 213; *Regina v. Stroud*, 2 Moody's C. C. *270; *Rex v. Waters*, 1 id. 457; *Rex v. Russell*, id. 489; *Blodgett v. State*, 3 Ind. 403; *Rex v. Walker*, 3 Campb. 264.

An instruction stating an abstract proposition of law, erroneous in itself, and not based on evidence properly before the jury, is erroneous. *Coughlin v. People*, 18 Ill. 266.

An instruction not restricting the jury's belief to the evidence, is bad. *Ewing v. Runkle*, 20 Ill. 448; *Chambers v. People*, 105 id. 409.

A material error in an instruction, calculated to mislead, is not cured by a subsequent contradictory one. Wharton on Crim. Pl. and Pr. sec. 793; *Clem v. State*, 31 Ind. 480; *Murray v. Commonwealth*, 79 Pa. St. 311; *Howard v. State*, 50 Ind. 194; *People v. Valencia*, 43 Cal. 543.

It is not the law, that to justify an acquittal the reasonable doubt must arise out of the evidence given, and be such as to cause a prudent man to hesitate. The doubt may arise from a want of evidence. *Jewell v. State*, 58 Ind. 293; *Stout v. State*, 90 id. 1; 1 Greenleaf on Evidence, sec. 13 a, and note a; Wharton on Crim. Evidence, sec. 718.

An instruction to the effect the jury must take the law as given by the court, unless they, on their oaths, are prepared to say they know the law better than the court, is bad. *Clem v. State*, 31 Ind. 480.

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It was error for the court, on its own motion, to sum up all the People's instructions, and not, in like manner, present the points favorable to the defence. *McEwen v. Morey*, 60 Ill. 32.

A party charged with crime is entitled to a trial by an impartial jury. Const. of U. S. art. 6 of amendments; Const. of Illinois, art. 2, sec. 9.

As to the qualification of jurors, see *Neely v. People*, 13 Ill. 685; *Smith v. Eames*, 3 Scam. 76; *Gardner v. People*, id. 83; *Vennum v. Harwood*, 1 Gilm. 659; *Baxter v. People*, 3 id. 368; *Gray v. People*, 26 Ill. 344; *Collins v. People*, 48 id. 146; *Railroad Co. v. Adler*, 56 id. 344; *Plummer v. People*, 74 id. 361; *Insurance Co. v. Schueller*, 60 id. 465; *Robinson v. Randall*, 82 id. 521; *Wilson v. People*, 94 id. 299; *Stevens v. People*, 38 Mich. 742; *Holt v. People*, 13 id. 224; *State v. Clarke*, 42 Vt. 629; *Boardman v. Wood*, 3 id. 270; *Black v. State*, 42 Texas, 377; *Wright v. Commonwealth*, 32 Gratt. 941; *Curry v. State*, 4 Neb. 544; *Farmer v. People*, 4 id. 68; *Eason v. State*, 6 *Baxter*, 466; 1 Trial of Burr, 416.

As to the prisoner's right to question jurors, with a view to exercise his right of peremptory challenge, see *Railroad Co. v. Buttolf*, 66 Ill. 347; *Lavin v. People*, 69 id. 303; *Commonwealth v. Eagan*, 4 Gray, 18; *People v. Rogers*, 5 Cal. 347.

The motion for a new trial on account of the partiality of jurors, as shown by the affidavits, should have been allowed. *Vennum v. Harwood*, 1 Gilm. 659; *Brakefield v. State*, 1 Sneed, 215; *Wright v. Commonwealth*, 32 Gratt. 941.

It was improper conduct of the jurors to take partial notes of the evidence. *Thompson & Merriam on Jury*, sec. 390; *Cheek v. State*, 35 Ind. 492; *Palmer v. State*, 29 Ark. 249.

As to the number of peremptory challenges given by law to the State, on a trial of several, see Crim. Code, sec. 432; *Schaeffer v. State*, 3 Wis. 730; *Wiggins v. State*, 1 Lea, 738; *Mayhon v. State*, 10 Ohio, 232; *State v. Earle*, 24 La. Ann. 38; *State v. Gay*, 25 id. 472; *Savage v. State*, 18 Fla. 925; *Wylie v. State*, 4 Blackf. 458; *State v. Reed*, 47 N. H. 466.

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When a panel of four jurors were excused by the defendants, it was the duty of the State to tender another panel accepted by it. *Brazier v. State*, 34 Ala. 387; *Fitzpatrick v. Joliet*, 87 Ill. 58.

As to the improper remarks of the court being error, see *Andrews v. Ketcham*, 77 Ill. 377; *State v. Harkin*, 7 Nev. 382; *Hair v. Little*, 28 Ala. 236.

As to the remarks of the prosecuting attorney, in his argument to the jury, see *Fox v. People*, 95 Ill. 70; *Henans v. Vogle*, 87 id. 242; *Ferguson v. State*, 19 Ind. 43; *State v. Smith*, 75 N. C. 306; *Dennis v. Haywood*, 63 id. 53; *Jenkins v. Ore Dressing Co.* 65 id. 563; *State v. Williams*, id. 505; *Earll v. People*, 99 Ill. 123; *Brown v. Swineford*, 42 Wis. 282; *Tucker v. Hennecker*, 41 N. H. 317; *Hilliard v. Beattie*, 59 id. 465; *Berry v. State*, 10 Ga. 522; *Mitchum v. State*, 11 id. 618; *Cobel v. Cobel*, 79 N. C. 587; *Willis v. McNeill*, 57 Texas, 465; *State v. Trumbull*, 86 Mo. 113.

In cases of conspiracy, a new trial as to one is a new trial as to all. Wharton on Crim. Pl. and Pr. sec. 305; Wharton on Crim. Law, sec. 1395; 3 Russell on Crimes, (9th ed.) *176; *Rex v. Gompertz*, 9 Q. B. 824; *Commonwealth v. McGowan*, 2 Parsons, 365.

Mr. GEORGE HUNT, Attorney General, Mr. JULIUS S. GRINNELL, State's Attorney, Mr. FRANCIS W. WALKER and Mr. EDMUND FURTHMAN, Assistant State's Attorneys, and Mr. GEORGE C. INGHAM, for the People:

Where there is a conspiracy to do an unlawful act, which naturally or probably involves the use of force and violence, the act of each conspirator, done in furtherance of the common design, is the act of all. If murder results, all are guilty of murder, even though the conspirator who does the act can not be identified. *Brennan v. People*, 15 Ill. 511; *Hanna v. People*, 86 id. 243; *Lamb v. People*, 96 id. 74, and cases cited in both

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opinions; *Kennedy v. People*, 40 id. 488; Wharton on Crim. Law, (9th ed.) sec. 1405.

Even though the particular act may not have been arranged for, or the means of its perpetration provided, the act was the natural result of the conspiracy, and was perpetrated in furtherance of the common design. Whether the act was the act of a member of the conspiracy, and whether it was done in furtherance of the common design, are questions of fact. See same authorities.

A man may be guilty of a wrong which he did not specifically intend, if it came naturally, or even accidentally, through some other specific or a general evil purpose. Where there is combination to do an unlawful thing, if the act of one, proceeding and growing out of the common plan, terminates in a criminal result, though not the particular result meant, all are liable. 1 Bishop on Crim. Law, 636; Hawkin's Pleas of the Crown, chap. 29, sec. 8; Foster, 351, sec. 6; Wharton on Homicide, 708; *State v. McCahill*, 30 N. W. Rep. 553; *Nevill v. State*, 60 Ind. 308; *Ritzman v. People*, 110 Ill. 369; *Hamilton v. People*, 113 id. 34; *Regina v. Tyler*, 8 C. & P. (34 E. C. L.) 616; *Regina v. Bernard*, 1 F. & F. 240.

Any act or declaration of any of the defendants, tending to prove the conspiracy, or the connection of that defendant with it, whether made during the existence of the conspiracy or after its completion, is admissible against him.

The conspiracy having been established *prima facie*, in the opinion of the trial judge, any act or declaration of any member of the conspiracy, though he may not be a party defendant, in furtherance of the conspiracy, is evidence against all the conspirators on trial. These propositions are elementary.

Whether a conspiracy is established *prima facie*, is a matter for the consideration of the trial court. But the order in which the proof is given is ordinarily immaterial. Greenleaf on Evidence, sec. 111; *State v. Winner*, 17 Kan. 298.

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The conspiracy may be established, in the first instance, by evidence having no relation to the defendants. It may be shown by acts of different persons, at different times and places, and by any circumstances which tend to prove it, and the defendants will not be affected by such proof unless they are connected with the conspiracy by proof. *State v. Winner*, 17 Kan. 305; 3 Greenleaf on Evidence, sec. 93; *Rex v. Hammond*, 2 Esp. 718; *People v. Mather*, 4 Wend. 261; 1 Bishop on Crim. Practice, secs. 277, 228; Wharton on Crim. Law, sec. 1398; *Regina v. Murphy*, 8 C. & T. 310; *Regina v. Frost*, 9 id. 129; *United States v. Cole*, 5 McLean, 601; *King v. Parsons*, 1 W. Black. 391; *Regina v. Bernard*, 1 F. & F. 240; *Campbell v. Commonwealth*, 84 Ill. 187; Roscoe on Crim. Evidence, 414; *Rex v. Stone*, 6 Durn. & E. 527; *Railroad Co. v. Collins*, 56 Ill. 212.

When a defendant takes the stand he is subject to the same rules of cross-examination as any other witness. By making himself a witness as to the offence, he waives his privilege, and, as affecting his credibility, may be asked whether he has been in prison for other crimes, etc. Wharton on Crim. Evidence, sec. 432.

A judgment clearly right will never be reversed for errors not affecting the substantial merits of the case. *Wilson v. People*, 94 Ill. 327; *Calhoun v. O'Neill*, 53 id. 354; *Leach v. People*, id. 311; *Clark v. People*, 31 id. 479; *Richmond v. People*, 110 id. 371; *Lander v. People*, 104 id. 250; *State v. Winner*, 17 Kan. 304.

Where advice to murder instigates murder, the adviser is guilty even if the perpetrator is unknown, provided the proof shows that the act was caused by the advice. Rev. Stat. chap. 38, secs. 274, 275.

An accessory before the fact may be charged and punished as a principal. *Baxter v. People*, 3 Gilm. 368; *Dempsey v. People*, 47 Ill. 326.

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At common law, the accessory may be guilty of the substantive crime, even if the principal is not pointed out, and is, in fact, unknown. 1 Archbold on Crim. Pl. and Pr. 67; 1 Wharton on Crim. Law, sec. 207; *Regina v. Tyler*, 8 C. & P. 616; 1 Bishop on Crim. Law, sec. 651; *Pilger v. Commonwealth*, 112 Pa. St. 220; *Brennan v. People*, 15 Ill. 516; *State v. Green*, 26 S. C. 103.

But if the principal is declared unknown in the indictment, and the proof shows he was known, there will be a fatal variance. *Rex v. Walker*, 3 Campb. 264; *Rex v. Blick*, 4 C. & P. 377.

No distinction exists between an accessory present and advising the commission of a crime, and one absent, who has advised, encouraged or instigated the act. *Pilger v. Commonwealth*, 112 Pa. St. 220; *Brennan v. People*, 15 Ill. 516; *State v. Green*, 26 S. C. 103; Hawkins' Pleas of the Crown, chap. 29, sec. 11; 1 Bishop on Crim. Law, sec. 673.

Under the statute making accessories principals, the fact that some other principal is also guilty, but unknown, in no way lessens the guilt of those known. *Commonwealth v. Adams*, 127 Mass. 15; 1 Wharton on Crim. Law, sec. 327.

One who instigates the perpetration of crime is guilty, even though the advice was general in its character, and was not specifically directed to any particular person to do any particular act. *Queen v. Most*, L. R. 7 Q. B. 244; *Green's case*, 26 S. C. 128; *Regina v. Sharp*, 3 Cox's C. C. 288; 1 Bishop on Crim. Law, sec. 641; *Foster*, 370, sec. 3; *Cox v. People*, 82 Ill. 192.

The giving of an instruction containing merely an abstract proposition of law, is a matter of discretion with the trial court. *Corbin v. Shearer*, 3 Gilm. 482; *Parker v. Fergus*, 52 Ill. 419; *Pate v. People*, 3 Gilm. 44; *Devlin v. People*, 104 Ill. 504.

As to instructions in relation to a reasonable doubt, see *Earl v. People*, 73 Ill. 329; *Dunn v. People*, 109 id. 635; *May v.*

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People, 60 id. 119; *Miller v. People*, 39 id. 457; *Connaghan v. People*, 88 id. 460.

No error to instruct that the jury are not at liberty to disbelieve as jurors, if, from the evidence, they believe as men, and that their oath imposes no obligation to doubt, when no doubt would exist if no oath had been taken. *Commonwealth v. Harman*, 4 Pa. St. 272.

No error to instruct the jury to form their verdict from the evidence alone, unaided and uninfluenced by any opinions or presumptions not founded upon the evidence. *Nerling v. Commonwealth*, 98 Pa. St. 334.

It is proper to instruct the jury that they have no right to disregard the instructions, unless prepared, on their oaths, to say they know the law better than the court. *Schnier v. People*, 23 Ill. 17; *Fisher v. People*, 23 id. 283; *Mullinix v. People*, 76 id. 211; *Darison v. People*, 90 id. 223.

The office of an instruction is to inform the jury of the law of the case. *Lander v. People*, 104 Ill. 248.

The court may instruct of its own motion, or modify instructions asked, and explain those given. *Vanlandingham v. People*, 4 Gilm. 125; Rev. Stat. chap. 110, sec. 53.

If counsel desire an instruction as to the form of the verdict other than that given by the court, they should prepare and ask it. *Dunn v. People*, 109 Ill. 646.

The overruling of a challenge of a juror for cause, can not be assigned for error unless it appears that the party has exhausted his peremptory challenges. *Collins v. People*, 103 Ill. 23.

An opinion of a juror, formed upon rumor or newspaper statements, as to the truth of which he has expressed no opinion, does not disqualify him, if he can state, on oath, that he believes he can impartially try the case on the law and the evidence. Rev. Stat. chap. 78, sec. 14; *Stokes v. People*, 53 N. Y. 171; *Thomas v. People*, 67 id. 220; *Phelps v. People*, 72 id. 363; *Greenfield v. People*, 74 id. 277; *Balbo v. People*,

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80 id. 484; *Cox v. People*, id. 512; *Abbott v. People*, 86 id. 460; *Corneth v. People*, 92 id. 85; *People v. Otto*, 101 id. 690; *Stevens v. People*, 38 Mich. 739; *People v. Mahoney*, 18 Cal. 183.

As to what is an impartial jury,—prejudice against crime: *Baxter v. People*, 3 Gilm. 376; *Smith v. Eames*, 3 Scam. 76; *Gardner v. People*, id. 83; *Neely v. People*, 13 Ill. 685.

In decisions of this court prior to the act of 1874, the jurors were competent. *Collins v. People*, 48 Ill. 145; *Leach v. People*, 53 id. 311; *Thompson v. People*, 24 id. 60.

And especially so under the act of 1874, changing the law. *Albright v. Walker*, 73 Ill. 69; *Plummer v. People*, 74 id. 261; *Insurance Co. v. Ward*, 90 id. 545; *Robinson v. Randolph*, 82 id. 521; *Wilson v. People*, 94 id. 299; *Richmond v. Roberts*, 98 id. 476; *Gradle v. Hoffman*, 105 id. 147; *Hughes v. People*, 116 id. 339; *Carrow v. People*, 113 id. 550; *Railroad Co. v. Bingenheimer*, 116 id. 226.

The jury was properly impaneled. *Fitzpatrick v. Joliet*, 87 Ill. 58.

A juror's affidavit will be received to sustain, but not to impeach, his verdict. 3 Graham & Waterman on New Trials, 1450, 1451; Hayne on New Trials, 224; *Hughes v. People*, 116 Ill. 338.

The People were entitled to the same number of peremptory challenges as the defendants,—one hundred and sixty. Rev. Stat. chap. 38, sec. 432.

The granting of separate trials is a matter of discretion. *Maton v. People*, 15 Ill. 536.

Where the evidence of guilt is satisfactory, the judgment will not be reversed for mere improper remarks of counsel for the People, tending to prejudice the jury against the accused. *Wilson v. People*, 94 Ill. 299; *Garrity v. People*, 107 id. 163.

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Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

This case comes before us by writ of error to the Criminal Court of Cook county. The writ has been made a *supersedeas*.

Plaintiffs in error were tried in the summer of 1886 for the murder of Matthias J. Degan, on May 4, 1886, in the city of Chicago, Cook county, Illinois. On August 20, 1886, the jury returned a verdict finding the defendants August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel and Louis Lingg guilty of murder, and fixing death as the penalty. By the same verdict they also found Oscar W. Neebe guilty of murder and fixed the penalty at imprisonment in the penitentiary for fifteen years.

About the 1st day of May, 1886, the workingmen of Chicago and of other industrial centers in the United States were greatly excited upon the subject of inducing their employers to reduce the time, during which they should be required to labor on each day, to eight hours. In the midst of the excitement, growing out of this eight-hour movement, as it was called, a meeting was held on the evening of May 4, 1886, at the Haymarket, on Randolph street, in the West division of the city of Chicago. This meeting was addressed by the defendants Spies, Parsons and Fielden. While the latter was making the closing speech, and at some point of time between ten and half-past ten o'clock in the evening, several companies of policemen, numbering one hundred and eighty men, marched into the crowd from their station on Desplaines street, and ordered the meeting to disperse. As soon as the order was given, some one threw among the policemen a dynamite bomb, which struck Degan, who was one of the police officers, and killed him. As a result of the throwing of the bomb and of the firing of pistol shots, which immediately succeeded the throwing of the bomb, six policemen besides Degan were killed, and sixty more were seriously wounded.

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It is undisputed that the bomb was thrown and that it caused the death of Degan. It is conceded that no one of the convicted defendants threw the bomb with his own hands. Plaintiffs in error are charged with being accessories before the fact. There are sixty-nine counts in the indictment. Some of the counts charge, that the eight defendants above named, being present, aided, abetted and assisted in the throwing of the bomb; others, that, not being present, aiding, abetting or assisting, they advised, encouraged, aided and abetted such throwing. Some of the counts charge that said defendants advised, encouraged, aided and abetted one Rudolph Schnau-belt in the perpetration of the crime; others, that they advised, encouraged, aided and abetted an unknown person in the perpetration thereof.

The Illinois statute upon this subject is as follows (chap. 38, div. 2, secs. 2 and 3):

"Sec. 2. An accessory is he who stands by, and aids, abets, or assists, or who, not being present, aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime. He, who thus aids, abets, assists, advises or encourages, shall be considered as principal, and punished accordingly.

"Sec. 3. Every such accessory, when a crime is committed within or without this State by his aid or procurement in this State, may be indicted and convicted at the same time as the principal, or before, or after his conviction, and whether the principal is convicted or amenable to justice or not, and punished as principal."

This statute abolishes the distinction between accessories before the fact and principals; by it all accessories before the fact are made principals. As the acts of the principal are thus made the acts of the accessory, the latter may be charged as having done the acts himself; and may be indicted and punished accordingly. *Baxter v. People*, 3 Gilm. 368; *Dempsey v. People*, 47 Ill. 323.

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If, therefore, the defendants advised, encouraged, aided or abetted the killing of Degan, they are as guilty, as though they took his life with their own hands. If any of them stood by and aided, abetted or assisted in the throwing of the bomb, those of them, who did so, are as guilty as though they threw it themselves.

It is charged, that the defendants formed a common purpose, and were united in a common design to aid and encourage the murder of the policemen among whom the bomb was thrown. If they combined to accomplish such murder by concerted action, the ordinary law of conspiracy is applicable, and the acts and declarations of one of them, done in furtherance of the common design, are, in contemplation of law, the acts and declarations of all. This prosecution, however, is not for conspiracy as a substantive crime. Proof of conspiracy is only proper, so far as it may tend to show a common design to encourage the murder charged against the prisoners. It may be introduced for the purpose of establishing the position of the members of the combination as accessories to the crime of murder.

The questions, which thus present themselves at the threshold of the case, are these: Did the defendants have a common purpose or design to advise, encourage, aid or abet the murder of the police? Did they combine together and with others with a view to carrying that purpose or design into effect? Did they or either or any of them do such acts or make such declarations in furtherance of the common purpose or design, as did actually have the effect of encouraging, aiding or abetting the crime in question?

The solution of these questions involves an examination of the evidence.

The first inquiry, which naturally suggests itself, is: who made the bomb which killed Degan?

First—The bomb was round. Zeller, a witness for the defence, says of it, as he saw it going through the air: "It

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seems to me it was more round and about as big as a baseball." Taylor, another witness for the defence, says: "I saw the bomb enough to know it was a round bomb."

There is much evidence in the record as to the different kinds of bombs and as to the mode of their construction. The simplest and cheapest form is what is known as the gas-pipe bomb, the mode of constructing which is hereafter explained. The gas-pipe bomb is the one which the ordinary, unskilled laborer would be most apt to make, if he desired to use such a weapon..

The round bombs, however, are more expensive, and their construction is more difficult and more liable to discovery. Such a bomb consists of two semi-globes, which, if made of iron, must be obtained at a foundry, or if made of zinc or other material, require the use of brass or clay moulds and facilities for melting the metals entering into their composition. The semi-globes must be fastened together by solder or by bolts. Holes must be drilled for the insertion of the bolts and also for the insertion of the caps and fuse. Care must be taken to fill in the dynamite properly and to insert the fulminating cap into the dynamite and the fuse into the cap. The construction of such bombs requires time and skill and involves considerable expense in the purchase of materials.

Second—The bomb thrown at the Haymarket was exploded by means of a *projecting fuse*, ignited before leaving the hand by a match or a lighted cigar. This abundantly appears from the evidence of those who saw it before it fell. One witness says it was like a fire-cracker in the air; another, that "it was like a burnt out match, that was lit yet;" another, that it was a "streak of fire" in the air; still another calls it "a little tail of fire quivering in the air."

As we understand the evidence in regard to the mode of constructing a round bomb with a fuse, the method is as follows: When the two semi-globular shells are fastened to-

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gether, and the dynamite is filled in through an opening made for that purpose, a fuse six or eight inches long is inserted in a detonating cap; the cap is pinched so as to hold the fuse; the cap is then inserted about two-thirds of its length into the dynamite through the opening, and five or six inches of fuse are left to project outside of the bomb.

There are bombs which do not have the projecting fuse. When explosion is desired from a distance, a wire and electric battery are used. A primer bomb has a percussion cap on each side, so that, when it is thrown, "whichever side strikes will explode the cap." Another kind of bomb is described in the testimony, as having the appearance of a fruit-can, containing a glass tube connected with the top by a screw, and so fixed as to explode when thrown against a hard substance.

The bomb with a projecting fuse of six or eight inches is made to be thrown into a crowd of men and when "only a few minutes are desired to get away," and "only so much fuse is required as can burn in the interval of throwing." When the fuse projects in the manner indicated it is necessary to apply a light externally to the end of the fuse before the bomb is thrown.

Third—The shell of the bomb, which exploded, was of *composite manufacture*. Pieces of the shell were taken by the physicians from the body of Degan and from the body of officer Murphy, who had fifteen shell wounds. These pieces were subjected to chemical examination, and were found to be composed of tin and lead, with traces of antimony, iron and zinc. The Degan piece contained slightly more tin than the Murphy piece, but the ingredients of the two pieces were exactly the same. The chemists, who made the analysis here referred to, and who have given their testimony in relation to the same, swear, that there is no commercial substance which has the same composition as these pieces of shell. Commercial lead, they say, never contains tin. Solder is composed of tin and lead, but the proportion of tin in solder to the

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amount of lead therein is so different from the proportions of those ingredients in the pieces of shell so analyzed, that the latter could not have been made of solder. Experiments also demonstrated that the exploded bomb could not have been made out of old lead-pipe, that had been plugged or mended with solder. The proportions of lead and tin in such case are vastly different from their proportions in the pieces of the bomb, which were subjected to examination. In the latter, lead was the basis of the preparation, but tin, or some other metal containing tin, was mixed with the lead.

Fourth—The bomb, which exploded, had upon it a small iron nut. One Michael Hahn was standing on the north-west corner of Desplaines and Randolph streets when the bomb exploded at the Haymarket meeting, and was struck by a part of it. On the morning of May 5, 1886, a surgeon extracted from his body an iron nut, threaded in the circular opening through its center, so as to fit upon the screw end of a bolt, of which it had evidently been a part. The discovery of this nut points unerringly to the conclusion, that the two semi-globular halves of the exploded bomb had been fastened together by a bolt and had not been soldered together. The evidence shows that soldering was the usual method of fastening together the two halves of the round bomb.

The four characteristics of the exploded bomb, which have been thus indicated, were found to exist in the bombs, which were made by the defendant Louis Lingg.

First—Many of the bombs made by Lingg were *round* or globular in form. The defendant Lingg came to this country for the first time in the summer of 1885 from some place in Germany. In August of that year he became acquainted with William Seliger, a German carpenter, who had resided in America three years and a half. Two weeks before Christmas, 1885, he went to board and room at Seliger's house, No. 442 Sedgwick street, in the North division of the city of Chicago. More than six weeks before May 1, 1886, he brought

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a bomb to the house and said he was going to make bombs. Some six weeks before that date, or about the middle of March, 1886, he brought dynamite there. He had three different kinds of dynamite. He had no regular employment for about four weeks prior to May 1, 1886. During this time he was experimenting with dynamite, and with round and long or gas-pipe bombs. He exploded the latter in the woods north of the city, and "says he put one right in the crotch of a tree and slit it all up." During a period of six weeks prior to May 1, 1886, he was at work from time to time making semi-globular bomb shells, and was often assisted in this work by Seliger and by two men named Thielen and Hermann or Heumann. These semi-globes appear to have been all finished before May 4, 1886, and, of course, were intended for round bombs, the only kind in the construction of which such shells were used. After Lingg's arrest, round bombs were found in a trunk in his room and under a sidewalk on Sigel street, where he is proven to have hidden them, and in the possession or under the control of one Lehmann, to whom he is proven to have given them. It thus appears that the exploded bomb corresponded in shape and form with many of the bombs made by Lingg.

Second—The bombs made by Lingg had the *projecting fuse* so as to be exploded by the external application of fire.

On April 30, 1886, being the Friday before the day of the Haymarket meeting, Lingg brought to Seliger's house a large wooden box, about three feet long, from sixteen to eighteen inches high and from sixteen to eighteen inches broad, inside of which was a tin box, containing dynamite. On the next Tuesday, May 4, 1886, he was occupied, during the afternoon and until after seven o'clock in the evening, in filling this dynamite into gas-pipes and globular shells, using a flat piece of wood, which he had made for that purpose. He was assisted in his labors by a number of persons, and among these were Seliger, Thielen and Hermann, already mentioned, and

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two men, named Huebner and Munsenberg or Muensenberger, the latter of whom was probably the blacksmith hereafter referred to. Upwards of fifty bombs were finished that afternoon, and the work on them would appear to have been continued up to or beyond the hour on that evening for which the Haymarket meeting had been called, as hereafter stated. The rooms in Seliger's house, which were used by Lingg and his assistants for their work, are spoken of as the front room and the bedroom. The witness Lehmann visited these rooms twice on Tuesday afternoon in company with a countryman of his, a Prussian, named Smideke, who went there with him to buy a revolver. His first visit was made at five o'clock in the afternoon, at which time he saw there Lingg, Seliger, Huebner, and a person of whom he speaks as follows: "One whose name I did not know; it is said that he is a blacksmith." They were in the bedroom, and each had a cloth tied around his face, but the witness "could not precisely see what they were doing."

The second visit was made to the rooms at seven o'clock in the evening, and lasted about ten minutes. At this time Lehmann did not get into the bedroom, but they were busy there as at the first visit. He saw Heubner working at some *coil of fuse*, which looked like strings or white cord; he was cutting it into pieces; they were putting fuse into caps in the front room. During one of these visits Lingg gave to Lehmann a small leather hand-satchel or trunk, which the latter took home and placed in his woodshed, and, at three o'clock next morning, after he had learned of the destruction wrought at the Haymarket, carried "away to the prairie," there burying its contents. The satchel contained a tin box or can nearly full of dynamite, and three *round* bombs, some caps, and *two coils of fuse*. Another circumstance may be mentioned in this connection. After ten o'clock on Tuesday night, when Lingg and Seliger were on Larrabee street, just south of North avenue, in the North division of the city, a patrol wagon passed

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them, which was manned with policemen, and had been summoned to the Haymarket by a call through the telephone. Lingg proposed to throw among the policemen in the wagon a bomb, which he had about his person, and, for the purpose of exploding it, demanded a light of Seliger, who was smoking a cigar at the time. It thus appears, that the bombs made by Lingg were made with the projecting fuse, and, so, corresponded with the second feature of the exploded bomb, as already noticed.

Third—The shells of the round bombs made by Lingg were constructed of *composite metal*.

Their correspondence in this particular with the shell of the exploded bomb tends very strongly to show, that the same hand, which made them, also made the exploded bomb. Lingg, Seliger, Thielen and Hermann were frequently engaged in "melting and casting" in Seliger's kitchen during the six weeks before May 1, 1866. Lingg melted lead or some other metal in a ladle on the kitchen stove. A pan is identified, as one which was used by him in making the semi-globes, found in his round bombs. He also made use for such purpose of clay molds, constructed by himself. One of these clay molds could only be used twice.

Pieces of bomb shells proven to have been made by Lingg in the manner and with the materials here indicated, were subjected to chemical analysis. They were composed of a certain percentage of tin, and the remainder was lead, with traces of antimony, iron and zinc. Out of four bombs examined, the percentage of tin in the different bombs varied slightly in three, and in the fourth considerably more than in the other three. As a result of the chemical analysis, the piece of shell taken from Degan's body, and the pieces of the shells, discovered in Lingg's possession after his arrest, were shown to be composed of exactly the same ingredients.

After May 4 there were found in Lingg's room a metal cup, a cold chisel, a file, shells, loaded cartridges, "metal and

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also some lead," "some babbitt-metal, some sheets of lead," bolts, pieces of metal in a Japan dinner box with four dynamite gas-pipe bombs, two loaded and two empty, a Remington rifle, a round dynamite bomb, loaded, two pieces of solder, a blast hammer and a smaller pointed hammer, a couple of iron bits and drills, a two-quart pail with sawdust in the bottom, a tin quart basin with fuse and sawdust or dynamite in it, two long cartridges of dynamite and some fuse already fixed, fuse about four inches long and caps, a big coil of fuse in the trunk, a piece of block tin, a piece of candlestick. Babbitt-metal is an alloy of copper, tin and zinc. Many of the articles found were chemically analyzed. The candlestick or toy proved, upon analysis, to contain tin, lead, antimony, zinc and a trace of copper. All the ingredients necessary to make up the composite material, out of which the exploded shell was constructed, were thus discovered to be in Lingg's possession.

The shell of the globular bomb, if entirely of lead, would be soft and yielding, and on this account would fail to furnish that degree of resistance to the dynamite, which appears from the evidence to be necessary, in order to make the explosion effective. It was evidently for this reason, that some other substance, such as tin, was combined with the lead to give the shell a firmer consistence and make its effects more deadly. With the same end in view, nails and wire, as will be hereafter seen, were recommended by the defendant Engel to be put around the gas-pipe bombs.

It appears, that, of the bombs made by Lingg, which were analyzed, each differed slightly from the others in the amount of tin, though all contained the same ingredients. It also appears, that the two halves of the same bomb would differ somewhat in the proportions of the metal present, and this accounts for the fact, that the piece from Degan's body contained a very little more tin than the piece from Murphy's body, each evidently coming from a different half of the bomb.

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These slight differences are such as would naturally be expected, when shells were made with the rude materials with which Lingg worked, melting his metals in a small ladle on a kitchen stove, casting half a shell at a time, making use of clay molds made by himself, each one of which could only be used twice.

Fourth—The semi-globular halves of each round bomb made by Lingg were fastened together by a bolt, upon one end of which was screwed a *small iron nut*, showing a remarkable correspondence between the Lingg bombs and the exploded bomb in the fourth peculiarity of the latter, which has been heretofore mentioned.

On the morning of Tuesday, May 4, Lingg left Seliger's house to go to a meeting on the West Side and did not return until one o'clock in the afternoon. Before leaving he instructed Seliger to go to work at the bombs, remarking that they would be taken away that day. He gave Seliger a bolt, and said "that he had not enough of those bolts," and told him to go to Clybourne avenue and "get there some that he had already spoken to the man about." About fifty of the bolts were procured in accordance with the directions thus given. Seliger was engaged in the forenoon in drilling holes in the shells already on hand for the bolts to pass through. He was chided by Lingg, upon the latter's return, for having progressed so slowly with the work, and was informed, that they would "have to work very diligently during the afternoon."

The evidence shows, that the bolt used by Lingg was a metallic pin running through the bomb, that a head was formed on one end of this pin, and on the other end there was cut a thread, upon which was screwed a moveable piece called a nut, the head at one end and the nut at the other holding the two semi-globes together. These bolts were found in the bombs afterwards taken from the possession of Lingg, and proven

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by the undisputed testimony in the case to have been made by him.

The nut taken from the body of Hahn, and which was a part of the exploded bomb, was applied to the threaded end of one of the bolts taken from a bomb made by Lingg and was found to fit it exactly. This can not be regarded otherwise than as a circumstance of very grave significance.

In view of the considerations thus far presented, and of others which will suggest themselves as the examination proceeds, we think the jury were warranted in believing from the evidence that the bomb, which killed Degan, was one of the bombs made by the defendant Lingg.

This conclusion receives indorsement from the fact, that the making of such bombs as have been described is a new, unusual and dangerous occupation. There are no bomb manufactories. A bomb is not an article, which can be bought in the market like a revolver. He, who would use such a weapon, must make it himself.

According to the evidence in this record, dynamite is composed of nitro-glycerine and clay or sawdust; it must be handled with care; it will explode, if subjected to too great a degree of heat; it should not be exposed to the rays of the sun, or placed too near the fire; if kept for any length of time, it must be stored with caution, for instance, it is recommended that it be wrapped in oil paper, placed in a box of sawdust and buried in the cellar; when, in handling it, it gets upon the skin, headache is produced; if its dangerous gases are inhaled, frightful pains in the head will be the result. Moreover, information as to its peculiarities and as to the safest mode of handling it is limited and, to some extent not accessible.

For these reasons so hazardous a business as filling bomb shells with dynamite will not usually be engaged in. Hence, when a murder is the result of the explosion of a dynamite

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bomb, and, about the time of the murder, a man is found making such bombs near the scene of the explosion, his responsibility for the crime, viewed in connection with other criminating circumstances which may exist, will be a more natural inference than where some more common weapon of destruction has been used.

The next question to be considered is: why did the defendant Lingg make the bomb, which killed Degan?

In order to satisfactorily answer this question, it becomes necessary to examine the character and purposes of an association, with which all the defendants in this case were connected.

The record shows the existence of an organization, known as the International Workingmen's Association, or the International Arbeiter Association, generally called the "Internationals," and sometimes designated for brevity as the I. A. A.

The platform or declaration of principles adopted by this organization was published by a certain bureau of information and by certain newspapers, called the "Alarm" and the "Arbeiter Zeitung," which are more particularly referred to hereafter. It appeared in all the issues of the latter paper during the months of February, March and April, 1886. It is too long for insertion here. It urges, that the present system, under which property is owned by individuals, should be destroyed, and that all capital, which has been produced by labor, should be transformed into common property. It says: "It is only when capital is made common and indivisible that all can be made to partake fully and freely of the fruits of common activity; only by the impossibility of acquiring individual (private) capital can every one be compelled to work who claims the right to live." It charges, that the government, the law, the schools, the churches, the press, are in the pay and under the sway of the property-owning and capitalistic classes, and that the laboring classes must achieve their deliverance through their own strength.

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This international platform thus addresses the workingmen: "As in former times no privileged class ever relinquished its tyranny, no more can we take it for granted, that the capitalists of the present day will forego their privileges and their authority without compulsion. . . . It is therefore self-evident, that the fight of proletarianism (the laboring classes) against the bourgeoisie (the middle classes) must have a violent revolutionary character, and that mere wage conflicts can never lead to the goal. We could show, by numerous illustrations, that all attempts, which have been made in the past to do away with the existing monstrous social system through peaceable means, for example, through the ballot-box, have been entirely useless and will be so in the future. . . . We know, therefore, that the ruling classes will not voluntarily relinquish their prerogative, and will make no concessions to us. Under all these circumstances, there is only one remedy left—force! . . . Therefore, it is your right, it is your duty, says Jefferson, to arm yourselves. *Agitation*, with a view to organization, organizations for the purpose of *rebellion*; herein is indicated in a few words the way which workingmen must take, if they would rid themselves of their chains."

It is here admitted, that the property of each individual in the community could not be taken away from him and put into a common fund to be divided among all the members of the community without a resort to revolution and force. The way to the result, sought to be reached by the International platform here referred to, leads, through the crimes of robbery, theft and murder, to the destruction of the existing system of social order and of all the laws and institutions upon which that system is based.

The association, whose principles are thus outlined in its platform, was divided into groups, of which there were eighty in the United States in March, 1885, located principally in the centers of industry. For some time prior to May 1, 1886,

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there was a number of these groups in Chicago. The following are spoken of by different witnesses: The North Side group, which met at No. 58 Clybourne avenue in the North division of the city; the North-west Side group, which met at Thalia Hall, No. 636 Milwaukee avenue, in the north-western part of the city; the American group, which met generally at No. 54 West Lake street, in the West division of the city, but sometimes at Baum's Pavilion at the corner of Cottage Grove avenue and Twenty-second street in the South division of the city, and at No. 45 North Clark street, No. 106 Randolph street, and on the Lake Front; the group "Karl Marx," which met at No. 63 Emma street in the West division; the group "Freiheit," which met on Sherman street in the South division; the South-west Side group, which met at No. 611 Throop street in the south-western part of the city; the group, "Jefferson No. 1," which met at No. 600 Milwaukee avenue.

The defendants Schwab, Neebe and Lingg belonged to the North Side group, the defendants Engel and Fischer to the North-west Side group, and the defendants Spies, Parsons and Fielden to the American group. Spies had also belonged to the North-west Side group.

The members of these groups were known by numbers and not by names. The members of the North Side group began to be known by numbers in July, 1884. The number of the witness Seliger, who belonged to the North Side group, was 72. Certain members of these groups were armed with rifles and drilled regularly once a week at their respective places of meeting, taking their rifles home with them after drill. These armed members were known and designated as the "armed sections" of the groups. The North Side group met every Monday night at 58 Clybourne avenue, and the armed section drilled there every Sunday morning. The armed section of the American group met every Monday evening at No. 54 West Lake street. The North-west Side group met Thursday evening at No. 636 Milwaukee avenue. The South-west

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Side group met every Saturday evening at No. 611 Throop street.

There was also a certain armed socialistic organization, called the Lehr und Wehr Verein, whose members seem to have been members also of the International groups, but to have been of a higher rank and to have attained a higher grade in the perfection of their drill than was the case with the ordinary members of the "armed sections." The evidence does not disclose the exact number of those, who belonged to the Lehr und Wehr Verein at the time of the trial, but in 1879 it had one thousand men. Its members were armed with Springfield rifles and were known by numbers. They conducted their drills and military exercises at Thalia Hall, No. 636 Milwaukee avenue, where the North-west Side group, the most radically anarchistic of all the groups, held its meetings.

The Lehr und Wehr Verein had four companies in Chicago. The witness August Krueger, whose number was 8, was orderly sergeant and corresponding secretary of the second company. Godfried Waller, whose number was 19, and Bernard Schrade, whose number was 32, were members of this second company. Schrade also belonged to the North-west Side group, and says they drilled once a week and kept their Springfield rifles at home. The third company seems to have had a drill every Thursday evening at a workingmen's hall on West Twelfth street.

The "armed section" of the American group was called the "International Rifles." After one of its drills on August 24, 1885, at No. 54 West Lake street, ten men, dressed in blue blouses and each armed with a Springfield rifle, and who belonged to the first company of the Lehr und Wehr Verein, were introduced into the room and drilled for the benefit of the new members of the "International Rifles." It was then and there stated, that, in case of a conflict with the authorities, the International Rifles were to act in concert with the Lehr

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und Wehr Verein and obey the orders of its officers. From this it would appear, that the Lehr und Wehr Verein or its officers were to direct the movements of the ordinary "armed sections," when occasion should require.

In the spring of 1885 there were in the city of Chicago three thousand of these armed socialists, of whom the defendant Parsons then said that "they were well-armed with rifles and revolvers and would have dynamite and bombs when they got ready to use them." As they were known by numbers, no record was kept of their names, and a system was adopted by which the members would be as little known to each other as possible.

These groups were represented by a general committee, composed of delegates from all the groups of the International Association in Chicago. This committee met every two weeks in a building in the South division of the city, known as No. 107 Fifth avenue, and called by the witnesses the "Arbeiter Zeitung Building," or the building of the International Arbeiter Association. The meetings of this committee were held in a library room which is spoken of by one of the witnesses as belonging to the "Arbeiter Zeitung" newspaper hereinafter mentioned, and which was located in the rear of the office room of that paper. In August, 1885, at the time of what is called the "car-drivers' strike," the witness Seliger was present in this room, as a delegate from the North Side group to the meeting of the general committee, and speaks of the defendant Spies as being there present on that occasion.

The members of the general committee had been in the habit of meeting in this library-room for a number of years, certainly since 1880. One Hirschberger was the librarian.

An exception should be made to the statement that all the groups appointed delegates to the general committee. The North-west Side group did not do so, and the reason given for this by Fricke, who was at one time a member of that group and for two years book-keeper of the "Arbeiter Zeitung," was,

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that the principles of the North-west Side group were more strongly anarchistic than those of the other groups. It was called an "autonomous" group.

A newspaper, called the "Arbeiter Zeitung," and conducted in the interest of the German-speaking groups of the International Arbeiter Association, was published in the building No. 107 Fifth avenue, and had its office and editorial rooms there. Its superintendent and chief editor was the defendant Spies. The defendant Schwab was co-editor, and wrote some of the most important of the editorials. The defendant Fischer was a type-setter in the office, and about the 1st of May, 1886, was the head foreman of the printing department. This paper was owned by a corporation, in which Spies, Schwab, Fischer and Neebe were stockholders. It was printed in the German language, and, besides its daily issue, had a Sunday edition, called the "Fackel," and a weekly edition called the "Vorbote." Its circulation was about thirty-six hundred. Notices of the meetings of workingmen were inserted in its columns without charge.

Another newspaper by the name of the "Alarm," owned by the International Arbeiter Association, and conducted in the English language in the interest of the English-speaking groups, was also published at the same building, No. 107 Fifth avenue. Its editor and manager from October, 1884, to May, 1886, was the defendant Parsons. The defendant Fielden owned some of the stock in the corporation which controlled it. Its circulation was about two thousand. It was first issued as a weekly, and afterwards as a semi-monthly paper. Still another newspaper, called the "Anarchist," was started in January or February, 1886, by the North-west Side group and two of the South Side groups. It was under the management of the defendant Engel. Its origin was announced as being due to the fact, that the "Arbeiter Zeitung" was not outspoken enough in its anarchistic principles. Its efforts

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were directed to the same ends as those contemplated by the other papers mentioned.

All the bills for the printing of the "Arbeiter Zeitung" and the "Alarm" were made out to the "Arbeiter Zeitung" and were paid by the defendant Spies, occasionally by check, but generally in currency.

There was a bureau of information of the Internationals. This also had its headquarters at the "Arbeiter Zeitung" building. The bureau of information, designated to act for the years 1885 and 1886, consisted of the defendants Spies and Parsons, the librarian Hirschberger, one Belthazer Rau, an advertising agent of the "Arbeiter Zeitung," and one Joseph Bach, a member of the North Side group and afterwards a director of the "Arbeiter Zeitung." Letters were always addressed to Spies, as a member of this bureau, at 107 Fifth avenue.

Besides the regular weekly meetings of the groups heretofore mentioned in their respective halls, there was occasionally a meeting of all the "armed sections" of the different groups at No. 54 West Lake street, known as Greif's Hall.

These meetings of the armed sections, whose members were located in the North, South and West divisions of the city, were irregular. They were called by a signal, given by the "Arbeiter Zeitung." This signal was: "Y.—Komme Montag Abend," or "Y.—Come Monday night." Whenever these words appeared in the letter-box column of the "Arbeiter Zeitung," they were understood to be a summons to the "armed sections" to meet on Monday night at Greif's Hall.

The evidence in the record shows, that there were in the city of Chicago twenty-five or thirty labor unions, containing from fifteen thousand to sixteen thousand laborers, and that delegates from these unions constituted a body called the Central Labor Union. The large majority of those, who belonged to the labor unions, were well-meaning workingmen, whose designs were not unlawful, and the object of whose

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organization was to better their own condition. They did not all belong to the groups of the International Association. But the members of those groups were, as a general thing, also members of the different labor unions.

It thus appears, that the branch of the International Workingmen's Association, which existed in Chicago during the year 1885, and up to May 4, 1886, was a compact, well-disciplined organization. At the head of it was a general or central committee. Next to the committee came the Lehr und Wehr Verein, a secret military organization divided into companies. Next to the Lehr und Wehr Verein came the "armed sections" of the various groups, practicing their weekly drills at night and on Sunday in various parts of the city, and, in some instances, under the direction of the officers of the Lehr und Wehr Verein. Next came the unarmed members of the groups, who were constantly in contact with their armed brethren and in hearty sympathy with their purposes and principles. As to some of the groups, however, all the members seem to have been engaged in arming and drilling.

There can be no doubt that the organization here described was an unlawful conspiracy.

First—Its *purpose* was unlawful. It designed to bring about a social revolution. Social revolution meant the destruction of the right of *private* ownership of property, or of the right of the *individual* to own property; it meant the bringing about of a state of society in which all property should be held in common. As a court, we are not concerned with the question, whether it was right or wrong to adopt and advocate an abstract theory in regard to the ownership of property, such as is here indicated. But this abstract theory assumed a concrete and practical form. The police and militia were looked upon as protectors and guardians of the form of ownership in property, which was objected to. Hence, "social revolution" meant war upon the police and militia. The destruction by force of the police and militia in the city of Chicago was the

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practical object which this organization proposed to accomplish in that city.

Second—Its *methods* were unlawful. The arming and drilling of the groups were in violation of the Militia law of the State of Illinois, which provides that “it shall not be lawful for any body of men whatever, other than the regular organized volunteer militia of this State and the troops of the United States, to associate themselves together as a military company or organization, to drill or parade with arms in any city or town of this State without the license of the Governor thereof,” etc. It is not pretended, that any such license was ever issued to these groups by the Governor of the State.

The central or governing authority of this International organization had its headquarters in the “Arbeiter Zeitung” building and in a room connected with the office of the “Arbeiter Zeitung” newspaper. From that place mainly its policy was dictated and the orders, which controlled its movements, were issued. Among the principal persons, who shaped its policy and outlined its course of action, were the defendants Spies, Schwab, Engel, Lingg, Fielden, Parsons, Fischer, and, in a subordinate degree, Neebe.

These defendants sought to use the organization for the purpose of bringing about the “social revolution,” and, to that end, endeavored to increase its membership and perfect its discipline so as to hurl it against the police and militia, as the representatives of law and order. Among the means, employed to accomplish this, were, “*agitation* with a view to organization,” and “organization for the purpose of rebellion.” The object of “*agitation*” was to increase the ranks of the “armed sections” of the International groups by recruits from the “Labor Unions” and other associations of workingmen. The meaning of “organization” was the arming of such recruits with dynamite and revolvers.

During the years 1885 and 1886 the defendants Spies, Schwab, Parsons, Engel and Fielden by numerous speeches,

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and by articles published in the newspaper organs above mentioned, persistently advised and encouraged the workingmen to arm themselves for a conflict with what were called the property-owning classes and with the police and militia, who were regarded as the special protectors of those classes. These speeches were made at picnics, in workingmen's halls, at gatherings of the International groups, in Market square, and from the windows of the "Arbeiter Zeitung" building. They denounced the police and militia. They inveighed against the "private right of property." They advised the purchase of rifles and dynamite.

Extracts from the "Alarm," the "Arbeiter Zeitung" and the "Anarchist," and from speeches of Schwab, Spies, Parsons, Fielden and Engel, are set out in the statement which precedes this opinion.

The articles in the "Alarm" were most of them, written by the defendant Parsons, but some of them by the defendant Spies. The articles, quoted from the "Arbeiter Zeitung," were written by the defendants Schwab and Spies. The single extract from the "Anarchist" was written by the defendant Engel.

The articles and speeches so collated are of the most violent and incendiary character. They seek to inspire a feeling of hatred among the workingmen against the police and militia and the property-owning classes. They not only recommend the workingmen to arm themselves with dynamite and rifles, but they give specific instructions how to handle and use dynamite and how to make bombs and how to procure weapons. They recommend the workingmen to attend the meetings of the International Arbeiter Association and read its organs. They advise the formation of special groups for committing deeds of violence, which are called "revolutionary actions," and point out the means of avoiding discovery after such deeds are committed. In the "Arbeiter Zeitung" articles will be found such expressions as these: "Each workingman

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ought to have been armed long ago;" "Daggers and revolvers are easily to be gotten, hand grenades are cheaply to be produced; explosives, too, can be obtained;" "The workingmen ought to take aim at every member of the militia;" "Your passport to it, Eden, is that banner which calls to you in flaming letters the word 'Anarchy;'" "Therefore, workingmen, do arm yourselves with the most effective means;" "There is no other way than to become immediately soldiers of the revolutionary army and establish conspiring groups, and let the ruins fall on the homes of such;" "We wonder whether the workingmen . . . will at last supply themselves with weapons, dynamite and prussic acid;" "Workingmen, arm yourselves;" "Enough is said about the importance of being armed. . . . We are to go to work to supply ourselves as quickly as possible with these useful things. . . . Dynamite bears several names here in America; among others it is known in trade also under the names of Hercules powder and giant powder;" "There marched a strong company of well-armed comrades of the various groups; . . . the nitro-glycerine pills were not missing;" "There exists to-day an invisible net-work of fighting groups;" "Every trades-union should make it obligatory to every member to keep a good gun at home and ammunition;" "If we do not bestir ourselves for a bloody revolution, we can not leave anything to our children but poverty and slavery. Therefore prepare yourselves in all quietness for the revolution."

The following expressions will be found in the extracts from the "Alarm:"

"One man, armed with a dynamite bomb, is equal to one regiment of militia," etc.; "Every man, who is master of these explosives, can not be approached by an army of men;" "How can all this be done? Simply by making ourselves masters of the use of dynamite; then. . . . administer instant death, by any and all means, to any and every per-

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son, who attempts to continue to claim personal ownership in anything. . . . Our war is not against men, but against systems; yet we must prepare to kill men who will try to defeat our cause. . . . The rich are only worse than the poor because they have more power to wield this infernal 'property-right;'" "Dynamite is the emancipator! in the hands of the enslaved it cries aloud, 'Justice or annihilation.' But, best of all, the workingmen are not only learning its use, they are going to use it. They will use it, and effectually, until personal ownership, property-rights are destroyed, etc. . . . Hail to the social revolution! Hail to the deliverer Dynamite;" "Nothing but an uprising of the people and a bursting open of all stores and store-houses to the free access of the public, and a free application of dynamite to every one who opposes, will relieve the world of this infernal nightmare of property and wages;" "Seeing the amount of needless suffering all about us, we say a vigorous use of dynamite is both humane and economical. . . . It is upon this theory that we advocate the use of dynamite. It is clearly more humane to blow ten men into eternity than to make ten men starve to death;" "Dynamite! of all the good stuff, this is the stuff. Stuff several pounds of this sublime stuff into an inch pipe, gas or water-pipe, plug up both ends, insert a cap with a fuse attached, place this in the immediate neighborhood of a lot of rich loafers, who live by the sweat of other people's brows, and light the fuse. A most cheerful and gratifying result will follow;" "The next issue of the 'Alarm' will begin the publication of a series of articles concerning revolutionary warfare, viz.: 'The Manufacture of Dynamite Made Easy,' 'Manufacturing Bombs,' 'How to use Dynamite Properly,'" etc. "All governments are domineering powers, etc. . . . Assassination will remove the evil from the face of the earth. . . . Assassination properly applied is wise, just, humane and brave. For freedom, all things are just;" "Though everybody nowadays speaks of dynamite, . . . few have any

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knowledge of the general character and nature of this explosive. For those, who will sooner or later be forced to employ its destructive qualities in defence of their rights as men, and from a sense of preservation, a few hints may not be out of place. Dynamite may be handled with perfect safety, if proper care is used," etc. (Then follows a series of minute directions.)

During the months of December, 1885, January, February and March, 1886, the following notice appeared in the "Arbeiter Zeitung":

"'Exercise in Arms.' Workingmen, who are willing to exercise in the handling of arms, should call every Sunday forenoon, at half past nine, at No. 58 Clybourne avenue, where they will receive instructions gratuitously."

In the "Alarm," from August 17, 1885, to April 24, 1886, appeared the following notice:

"The armed section of the American group meets Monday night, at No. 54 West Lake street."

One Herr Most had prepared a treatise or book, entitled "Revolutionary Warfare," containing instructions, that entered into the minutest details, as to the best mode of preparing dynamite and other explosives, and of making bombs and other weapons. From time to time in 1885 and 1886, the "Alarm" and the "Arbeiter Zeitung" published translations and extracts from this book, for the evident purpose of communicating the information in it to the members of the groups and to their other readers among the workingmen. Specimen extracts from this treatise are set out in the statement which prefaces this opinion.

In the extract from the "Anarchist" will be found the following expressions: "All government we hate. . . . Complaints should be sent to G. Engel. . . . Workingmen and fellows: . . . he, who would war successfully, must equip himself with all implements adapted to destroy his op-

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ponents. . . . We strive towards the overthrow of the existing order," etc.

The defendant Schwab, in a speech delivered on April 26, 1886, about a week before the Haymarket meeting, said: "Everywhere police and murderers are employed to grind down workingmen. For every workingman, who has died through the pistol of a deputy sheriff, let ten of those executioners fall. Arm yourselves!"

The defendant Spies, in a speech made in October, 1885, said that "there were nine millions of people engaged in industrial trades in this country; there were but one million of them as yet organized, while there were two millions of them unemployed; to make a movement, in which they were engaged a successful one, it must be a revolutionary one; don't let us . . . forget the most forcible argument of all—the gun and dynamite."

In speeches made by him, the defendant Parsons said, in February, 1885: "We need no president, no congressmen, no police, no militia and no judges; they are all leeches sucking the blood of the poor, who have to support them by their labor; I say to you, rise, one and all, and let us exterminate them all. Woe to the police or the militia whom they send against us!" In April, 1885, he said: "The only way to convince these capitalists and robbers is to use the gun and dynamite." Again he said, in April, 1885: "If we would achieve our liberation from economic bondage and acquire our natural right to life and liberty, every man must lay by a part of his wages, buy a Colt's navy revolver, a Winchester rifle, and learn how to make and to use dynamite. Then raise the flag of rebellion, the scarlet banner of liberty, fraternity, equality, and strike down to the earth every tyrant, that lives upon this globe. Tyrants have no rights, which we should respect. Until this is done, you will continue to be robbed, to be plundered, to be at the mercy of the privileged few; therefore *agitate for the purpose of organization, organize for the pur-*

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pose of rebellion, for wage-slaves have nothing to lose but their chains." And in August, 1885, referring to the street-car strike, he said: "If but one shot had been fired and Bonfield had happened to be shot, the whole city would have been deluged in blood and the social revolution would have been inaugurated."

The defendant Fielden, in speeches made by him, said in March, 1885: "I want all to organize; every workingman in Chicago ought to belong to our organization; it is of no use to go and beg of our masters to give us more wages or better times. When I say, 'organize,' I mean for you to use force; it is of no use for the working people to hope to gain anything by means of the ordinary weapons; every one of you must learn the use of dynamite, for that is the power with which we hope to gain our rights." In October, 1885, he said: "You must all organize and use force; you must crush out the present government, as by force is the only way, in which you better your present condition." He said in January, 1886: "It is quite true, that we have lots of explosives and dynamite in our possession, and we will not hesitate to use it, when the proper time comes. We care nothing either for the military or police, for these are in the pay of the capitalist." Again in March, 1886, he said: "We are told that we must attain our ends and aims by obeying law and order. Damn law and order! We have obeyed law and order long enough. The time has come for you, men, to strangle the law, or the law will strangle you."

The defendant Engel made a speech in German in February, 1886, to a crowded hall of workingmen, of which one witness says: "He advised everybody—'every man wants to join them, to save up three or four dollars to buy revolvers to shoot every policeman down;' he says he wants every workingman, whom he could get, to join them, and then advise every body you know—you save up three or four dollars to buy a revolver that was good enough for shooting police-

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men down ;" and again in the same month he made a speech to the North Side workmen at Neff's Hall, 58 Clybourne avenue, where the North Side group met, as already stated, in which he said "that those who could not arm themselves and could not buy revolvers, should buy dynamite ; that it was very cheap and easily handled ; he gave a general description how bombs could be made, how gas-pipes could be filled ; that a gas-pipe was to be taken and a wooden block put into the end, and it was to be filled with dynamite ; then the other end is also closed up with a wooden block, and old nails are tied around the pipe by means of wire ; then a hole is bored into one end of it and a fuse with a cap is put into that hole ; that the nails should be tightened to the pipe, so that when it explodes, there will be many pieces flying around ; that gas-pipe could be found on the West Side from the river, near the bridge."

The utterances by printed and spoken words, of which the quotations above made are specimens, were addressed to workingmen, of whom the defendant Spies says that they were "stupid and ignorant." While the members of the International groups were reading and hearing the appeals, thus made to their prejudices, they were discussing their condition in weekly meetings, and very many of them participating in weekly drills with arms.

The time, when the war against the police was to be inaugurated, was not an indefinite period in the future. The evidence shows, that the date, fixed for the inauguration of the social revolution, was the 1st of May, 1886.

Two years before May 1, 1886, the working people had "resolved that the eight-hour system should be introduced in the United States" at that date. The defendants in this case and the more radical members of the International groups had no faith in the eight-hour movement. This abundantly appears from the testimony in the record. Gruenhut swears, that Spies did not consider the movement as amounting to any-

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thing; that he regarded it as "only a palliative measure, not radical enough." A want of confidence in it on the part of the defendant Spies is apparent from the language of some resolutions, introduced by him on October 11, 1885, at a meeting at the Twelfth street Turner Hall, one of which began in this wise:

"Resolved, That, while we are skeptical in regard to the benefits that will accrue to the wage-workers in the introduction of an eight-hour work day," etc. At a speech made at the same meeting Fielden said: "The eight-hour law will be of no benefit to the workingman." An article in the "Alarm," dated April 3, 1886, in which the defendant Parsons gives an account of a speech made by him to the American groups, shows that he only valued "the attempt to inaugurate the eight-hour system," because he thought it "would break down the capitalistic system and bring about such disorder and hardship, that the 'social revolution' would become a necessity."

Engel said in the "Anarchist:" "We reject reformatory measures as useless play. . . . All endeavors of the working classes not aiming at the overthrow of existing conditions of ownership . . . are to us reactionary," etc.

The 1st of May was fixed upon as the date for the inauguration of the "social revolution" because of the strikes and disturbances, which were then expected to grow out of the demand for the eight-hour working day. It was anticipated, that many workingmen would then be out of employment and that their discontent and sufferings would drive them into an adoption of the revolutionary plans of the International groups.

The witness Johnson says, that, at the meetings of the armed section of the American group, "the 1st day of May was frequently mentioned as a good opportunity" for the revolution.

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In a speech in December, 1885, at Twelfth street Turner Hall, Fielden said:

"The 1st of May will be our time to strike the blow; there are so many strikes and there will be fifty thousand men out of work."

Spies said that the conflict between the police and the "dynamiters" would probably occur, when there should be an universal strike for the eight-hour law.

The international groups and other associations of workingmen were frequently urged to prepare to demand the eight-hour law on the 1st of May, 1886, with arms in their hands. They were told that such demand would be the more readily acceded to, if made by armed men.

In an article published in the "Arbeiter Zeitung," on the afternoon of Tuesday, May 4, 1886, only a few hours before the Haymarket meeting occurred, the defendant Spies said: "Six months ago, when the eight-hour movement began, there were speakers and journals of the I. A. A. who proclaimed and wrote: 'Workmen, if you want to see the eight-hour system introduced, arm yourselves. If you do not do this, you will be sent home with bloody heads, and birds will sing May songs on your graves.'"

Looking into some of the statements, made by the journals and speakers referred to, we find the following:

The "Arbeiter Zeitung" said on January 22, 1886: "With empty hands the workingmen will hardly be able to cope with the representatives of the club, in case, after the 1st of May of this year, there should be a general strike; . . . but if the workingmen are prepared to eventually stop the working of the factories, to defend himself with the aid of dynamite and bombs against the militia, which will of course be employed, then and only then can you expect a thorough success of the eight-hour movement." It said on January 23, 1886: "Therefore, comrades, armed to the teeth, we want

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to demand our rights on the 1st of May; in the other case there are only blows of the club for you." It said on March 2, 1886: "Who wants to attack capitalism in earnest must overthrow the body-guards of it, the well-drilled and well-armed 'men of order,' and kill them, if he does not want to be murdered himself. But for this is needed an armed and systematically drilled organization;" and on the same page are these words: "The time up to the 1st of May is short. Look out!"

The "Alarm" said on September 5, 1885: "Now in regard to the proposed strike *next spring*, a few practical words to our comrades. . . . Will the manufacturing kings grant the modest request? . . . No, sir, . . . they will then draw from the army of unemployed; the strikers will attempt to stop them. Then comes the police and the militia. . . . Say, workingmen, are you prepared to meet the latter; are you armed?"

The defendant Spies, on October 11, 1885, at the meeting at Twelfth street Turner Hall, already referred to, introduced, in a speech made by him, the following resolution:

"Whereas, a general move has been started among the organized wage-workers of this country for the establishment of an eight-hour work day, to begin May 1, 1886. And

"Whereas, it is to be expected that the class of professional idlers, the governing class, who prey upon the bones and marrow of the useful members of society, will resist this attempt by calling to their assistance the Pinkertons, the police and the State militia,

"Resolved, That we urge upon all wage-workers the necessity of procuring arms before the inauguration of the proposed eight-hour strike, in order to be in a position of meeting our foe with his own argument—force."

A little over two months after this resolution was introduced, to-wit, on December 29, 1885, the North Side group, to which Schwab, Lingg and Neebe belonged, held a meeting

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at No. 58 Clybourne avenue and adopted the following resolution: "This assembly declares that the North Side group, I. A. A., pledges itself to work with all means for the introduction of the eight-hour day, beginning on the 1st of May, 1886. At the same time *the North Side group cautions the workingmen not to meet the enemy unarmed on the 1st of May*," etc.

Besides the publication of extracts from Herr Most's book in the "Alarm" and "Arbeiter Zeitung," the book itself was extensively circulated among the groups and other workingmen. The "Arbeiter Zeitung" inserted, without charge, on March 2, 15, 18 and 25, 1886, the following notice: "'Revolutionary Warfare' has arrived and is to be had through the librarian at 107 Fifth avenue, at the price of ten cents." Hirschberger, the librarian here referred to, sold this book at picnics, where the defendants Fielden, Parsons, Spies, Schwab, Fischer and Neebe were present. It was distributed at meetings of workingmen. It was seen at such meetings in the Twelfth street Turner Hall, at Greif's Hall and at 106 Randolph street, at all of which places Fielden and Parsons made speeches, and where the American group, to which they belonged, held meetings. The "books were sold there. The chairman had charge of the books."

One of the witnesses says he saw copies of Herr Most's book at meetings of the North Side group and that "the North Side group bought and sold them."

The efforts of the defendants to prepare for the disturbances expected to grow out of the eight-hour movement on or about May 1, 1886, were not confined to speeches or newspaper articles. Nor was the circulation of Herr Most's book on Revolutionary Warfare the only step taken towards the instruction of the groups in the mode of preparing and using dynamite. The record discloses the adoption by the defendants of other and more practical measures in the work of preparation.

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In the fall of 1885 the defendant Engel called on a gunsmith and inquired what a hundred or possibly two hundred large revolvers could be purchased for, stating that they were wanted for some society. He bought and paid for one of the pistols for the purpose of presenting it at a meeting of the society. After the Haymarket meeting a machine, which was intended to be used for the purpose of making bombs, was found by the police at Engel's house. The proof shows, that, in the late spring or early summer of 1885, a part of this machine was made by a tinner on Milwaukee avenue in pursuance of an order therefor given by Engel in person.

A witness engaged in the gun business, swears, that in February or March, 1886, the defendant Parsons called at his store and stated, that he wanted to buy forty or fifty revolvers. Upon being shown the samples on hand, he declared that they were not what he desired, but that he wanted "old remodeled Remington revolvers." The witness wrote for quotations as to the prices and gave them to Parsons upon his calling afterwards. He came in again once or twice, but did not finally make the purchase.

The testimony shows, that in the summer of 1885 the defendants Fielden and Parsons participated in the drilling exercises, at No. 54 West Lake street, of the armed section of the American group, to which they both belonged, and of which Fielden was the secretary and treasurer. A drill occurred at that place on August 24, 1885. Fielden and Parsons were present and took part. Suspected persons were ejected, the doors were closed, and the company was drilled for half or three-quarters of an hour by a German drill-master, going through the regular manual of drill, marching, counter-marching, turning, forming fours, wheeling, etc. It was on that occasion that the ten members of the first company of the Lehr und Wehr Verein, armed with Springfield rifles, were introduced, and drilled before the members of the "armed section" of the American group. On that occasion, also,

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the "armed section" adopted the name of the "International Rifles," of which one Walters was elected captain, and the defendant Parsons lieutenant. The International Rifles there agreed, as heretofore stated, to act in concert with the Lehr und Wehr Verein and obey the orders of its officers in the event of a conflict with the authorities. At that meeting, the drill-master exhibited two specimens of the latest improved dynamite bombs for the examination of those present. They were about the size and had the appearance of ordinary preserve fruit cans. The top part unscrewed, and the inside of the cans was filled with a light-brown mixture. There was also a small glass tube inserted in the center of the can. The tube was in connection with the screw, and it was explained that where the can was thrown against any hard substance it would explode.

At a subsequent meeting at the same place on August 31, 1885, the defendants Fielden and Parsons were present and participated in another drill under Walters, which lasted an hour and a half. A consultation was had as to the best means of procuring arms. It was proposed that each member should pay so much a week, until enough should be raised to buy a rifle for each. The defendant Parsons proposed that a raid be made at night upon the armory of the militia.

It furthermore appears from the evidence, that the defendants Spies, Schwab, Fielden, Parsons and Fischer were engaged in handling bombs and experimenting with dynamite. Samples of bombs were kept at the rooms of the "Arbeiter Zeitung." Improved kinds of bombs were several times left there for the inspection of the defendant Spies. At one time two bombs, whose shells were of iron, and which were so made as to be exploded by percussion, were left with the defendant Spies at his office in the building No. 107 Fifth avenue. At another time two bombs, known as the czar bombs, were brought to Spies at the same office and left there with him.

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The defendant Spies admits in his testimony that he purchased bars of dynamite and caps and fuse for the purpose of experimenting with them. On the morning after the Haymarket meeting there were found at the office aforesaid a coil of fuse, two bars of dynamite and a box containing fulminating caps for the explosion of dynamite.

Three witnesses swear that they were at the office of the "Arbeiter Zeitung" in April, 1885, on the evening of what is known as the board of trade demonstration, and after the demonstration had ended; that Spies, Parsons, Fielden and Schwab were present; that a dynamite cartridge, a coil of fuse and a fulminating cap were taken by Spies from a drawer in the desk and handed to Parsons, by whom they were exhibited to the witnesses. On that occasion Parsons said, that they were preparing for a warfare against the police and militia with bombs and dynamite and rifles and revolvers; and Fielden, who was standing at the elbow of Parsons, said that "the next time the police attempted to interfere with them they would be prepared for them," "and perhaps in the course of a year or so."

In August, 1885, Seliger was present at the office of the "Arbeiter Zeitung," at a meeting of the general or central committee of the International Association. He was there as a delegate from the North Side group. The committee met in the evening in the library room belonging to the International Workingmen's Association. The defendant Spies was present. Seliger saw there two bombs, one round one and one long one. They were below the counter. Rau, the advertising agent of the "Arbeiter Zeitung," was exhibiting them, while the delegates were present.

On Thanksgiving day in November, 1885, there was a meeting of workingmen on Market square. On that day at Thalia Hall the defendant Fischer gave to Godfried Waller, a member of the Lehr und Wehr Verein, a gas-pipe bomb, seven or eight inches long, saying that it was to be used on

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Market square in case of an attack by the police. Waller kept the bomb in his house two weeks, and then gave it to a member of the Lehr und Wehr Verein, who exploded it in the woods in a hollow tree.

Spies and other members of the organization, to which he belonged, were in the habit of going out into the country in the summer and practicing with bombs. Their practice was directed to the two-fold object of learning how to throw the bombs and also of learning how to explode them. An instance is referred to in the evidence, where one of them was exploded in a grove and demolished some of the trees.

One of the witnesses testifies, that, in January, 1886, at the "Arbeiter Zeitung" office, he had an interview with the defendant Spies, at which one of the czar bombs, heretofore referred to, was produced and shown by Spies, and afterwards carried away by the witness. On that occasion Spies stated, that bombs were sometimes distributed through the "Arbeiter Zeitung" office, and that the one then shown was one of the samples they kept there. He also then stated, that a fuse bomb with a detonating cap inside, such as was the czar bomb, had been proven to be the best kind, and that shells made of compound metal were much better than shells made of all lead or all metal. He spoke of a body of tall, strong men in their organization, who could throw bombs, weighing five pounds, one hundred and fifty paces.

He stated that the bombs in question were to be used in case of conflict with the police or militia.

Coming back to the defendant Lingg, we think it quite apparent from the testimony, that his efforts in the matter of constructing bombs, as heretofore narrated, were made under the auspices of the International Association, and in furtherance of its objects and purposes. What he did was merely a part of that general preparation, which the other defendants and the groups already described, were making for the conflict expected to take place in the early part of May, 1886.

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That this is so will appear from several considerations.

First.—In March, 1886, the carpenters' union had a ball at Florus Hall, No. 73 West Lake street. A profit was made on the beer sold at this ball, and it was there suggested, that the money representing that profit should be used to buy targets, lead, etc., for some shooting practices, that were expected to take place. The money was, however, turned over to the "armed section" of the carpenters' union, that is to say, to those members of the carpenters' union, who belonged to the armed sections of the different International groups. Several of these members came together at a subsequent meeting and resolved to buy dynamite and practice with that, instead of shooting at targets. The last-named meeting also took place at Florus Hall, and Lingg and Lehmann, who both belonged to the "armed section" of the North Side group, were present. Lehmann says: "It was unanimously resolved, that we were to buy dynamite with it, and experiment with it to find out how it was used; how it was handled. We were unanimous that some one should take the thing in hand, and Lingg was intrusted with it, and he took the money and bought dynamite with it."

It was just about this time, to-wit, the middle of March, 1886, when Lingg first brought a bomb and dynamite to Seliger's house and began to melt and cast and make shells, as heretofore set forth.

It thus appears, that about two months or six weeks before the Haymarket meeting the defendant Lingg was selected by certain members of the armed sections of the International groups as their agent to buy dynamite with their money, and experiment with it and learn how to use and handle it.

The reason why Lingg was selected for this work is quite manifest. Although he was only twenty-one or twenty-two years old at the time of the trial, and, prior thereto, had lived in this country only about nine or ten months, he seems to have taken an active interest in the movements of the Inter-

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national Association. He had been a socialist in Europe "ever since he could think." As already stated, he belonged to the armed section of the North Side group. He was not only a member of the carpenters' union, but its financial secretary. He was seen at meetings on the Lake Front, where some of the defendants already named were making speeches. He was present at meetings of the Central Labor Union. He made a speech on April 4, 1886, at 650 Blue Island avenue, at the second meeting of the lumber shovers' union. He was seen at almost every meeting of the carpenters' union at Zepf's Hall from September, 1885, to May, 1886. At a meeting of that union at Zepf's Hall on the night of May 3, 1886, he is said to have made a lengthy report as to the organization of the carpenters at the different shops, and to have had the floor two or three times in the discussion of the eight-hour movement. On the morning of May 3, young men came to his room at Seliger's house and had their names entered upon the list of the union. He was well known to Bach and Spies; the former had known him five or six months. He carried reports of anarchist meetings to the "Arbeiter Zeitung," and had gone to that paper for that purpose at least five times. He was present on the afternoon of May 3, 1886, at the attack hereafter mentioned of a mob of strikers upon a manufacturing establishment in the south-western part of the city, and must have heard the address of Spies on that occasion. He claimed, after his arrest, to have been clubbed by the police at that disturbance.

Second — Thielen, Lehmann, Seliger, Hermann or Heumann, and Huebner, who were with Lingg on Tuesday afternoon, while he was filling the bombs, and some of whom were assisting him in his work, were all prominent members of the "armed sections" of the International groups. Huebner was the librarian of the North Side group, and had charge of the distribution of Herr Most's book. Seliger, with whom Lingg had boarded for months, and who was his main assistant in

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making the bombs, was a member of the general committee, which stood at the head of all the groups, and, as has already been stated, had been present with Spies at a session of that committee when Rau was exhibiting to its members samples of round and long bombs, such as Lingg himself afterwards made.

Third—One of the czar bombs, which was in the possession of Spies in January, 1886, was produced upon the trial of this cause in the court below. It is similar in all respects to the bombs made by Lingg, and to the bomb which exploded at the Haymarket. We find photographic views of it in the record. It consists of two semi-globular shells fastened together by a metallic bolt, with a head at one end and a nut at the other.

It has the fuse and detonating cap, the latter pinched to hold the fuse, just as appears in the photographic representations, to be found in the record, of the bombs made by Lingg.

The nut, taken from the body of Hahn, corresponded as exactly with the nut upon the czar bomb as with the nuts upon the Lingg bombs.

A chemical analysis was made of the material of the shell of the czar bomb, and such material was found to be of the same composite manufacture, as that which characterized the Lingg bombs and the Haymarket bomb. The "Spies bomb" or czar bomb "was found like the others to consist also chiefly of lead with a small quantity of tin, and traces of the same antimony, iron and zinc." This circumstance, taken in connection with the declaration of Spies, that members of the International groups had, by practice and experiment, demonstrated the superiority of compound metal in the construction of bomb shells, points very strongly to the conclusion, that the czar bomb, retained by Spies in his possession in January, 1886, was used by Lingg as a sample, and was the same bomb, which Seliger saw at his house in Lingg's hands more than six weeks before May 4, 1886.

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Fourth—Another circumstance is worthy of mention in this connection. In a communication upon the subject of making bombs, published by Spies in the "Alarm" on June 27, 1885, he says: "When filling bombs . . . tie a handkerchief over mouth and nose, so that you may not inhale the dangerous gases. . . . In filling bombs use a little wooden stick," etc.

It has already been stated, that when Lingg and Huebner were filling bombs on the afternoon of Tuesday May 4, 1886, each of them had a cloth tied around his face, and Seliger and Lingg used a flat piece of wood, made by Lingg for the purpose of putting dynamite into the shells. Thus the instructions given by Spies in the "Alarm" were literally complied with by the bomb-makers on May 4, 1886.

We think the jury were warranted in believing from the evidence, that the bomb, which exploded at the Haymarket, was made by the defendant Lingg in furtherance of the conspiracy already described.

The question, which next suggests itself, is, whether the bomb, so made, was thrown at the Haymarket by a member of said conspiracy, or by some one acting under its direction and in pursuance of its designs.

In order to solve this question, it will be necessary to make a preliminary investigation as to the *disposition*, which Lingg and his assistants made of the bombs, constructed by them, after they were prepared for use.

The bombs, made and filled on Tuesday afternoon and evening, were carried by Lingg and Seliger on that evening from Seliger's house over to No. 58 Clybourne avenue, known as Neff's Hall. The trunk or satchel in which they had been placed, was carried a part of the way by Lingg and Seliger by means of a stick drawn through the handle. They were met on the way, however, by Muenzenberger, who has been heretofore spoken of, and he seems to have then taken the trunk and carried it the rest of the way on his shoulder. It was about

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ten minutes' walk from 442 Sedgwick street to Neff's Hall. Neff says, that they reached his saloon at ten or fifteen minutes after eight, but Seliger states that they started from his house with the bombs at half-past eight.

At No. 58 Clybourne avenue the front room on the first floor is a saloon. Back of the saloon is a hall or assembly room. Between the saloon and hall is a passage-way, which can be entered by doors leading from the saloon and hall, and also by a door opening upon a walk that leads along the side of the building into the street. On this evening a meeting of painters was in session in the hall. Lingg, Seliger and Muenzenberger first went into the saloon, and Lingg inquired of Neff if any one had been there and asked for him, to which he received a negative reply. Lingg and Seliger, accompanied by Muenzenberger, with the satchel or trunk, then went from the saloon into the passage-way above referred to. The trunk was placed upon the floor in this passage-way or hall-way and opened. Seliger says: "Several persons came and took bombs. There were different ones there who took bombs out for themselves." He saw three or four take them. He himself took two and carried them in his pocket, until after the explosion that night, when he buried them under the sidewalk on Sigel street, where they were afterwards found, as shown by the testimony of several witnesses.

Lingg and Seliger then went out of the building, No. 58 Clybourne avenue, leaving the open satchel with the bombs in it in the passage-way, where it had been deposited.

Muenzenberger also disappeared. The latter seemed to be a stranger; Neff, the keeper of the saloon, never saw him, until he brought the satchel there that night; Lehmann did not know him, as has already been stated. Although he was at Seliger's house that afternoon from four to six o'clock working at bombs, Seliger did not know his name and did not learn it until some time afterwards. This circumstance naturally calls to mind the instructions in regard to revolutionary actions,

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published in the "Arbeiter Zeitung" on March 16, 1885, and set forth in the statement hereto prefixed, one sentence of which is as follows: "In the commission of a deed, a comrade who does not live at the place of action, that is, a comrade, of some other place, ought, if possibility admits, to participate in the action, or, formulated differently, a revolutionary deed ought to be enacted where one is not known."

In this narration in regard to the *disposition* of the bombs two facts are noticeable. *First*—They were carried to and left at No. 58 Clybourne avenue. Why? Neff's Hall was known as the "Shanty of the Communists." There the communists and anarchists and all the various shades of the socialistic organizations were in the habit of meeting. Some statements already made in regard to this place may be here briefly recapitulated. It was the place where the members of the North Side group met every Monday evening and advised together and reviewed what had happened among the workingmen during the week, and drilled with hunting-guns and shot-guns, and some of them, on Sundays, with rifles. It was the place where the "Arbeiter Zeitung" requested workingmen, willing to exercise in the handling of arms, to call every Sunday for the purpose of receiving instructions gratuitously. It was the place, where the North Side group had adopted a resolution cautioning the workingmen "not to meet the enemy unarmed on May 1st," etc. The manner, in which the bombs were left at this particular place and there exposed to view, considered in connection with all the other circumstances heretofore and hereafter mentioned, points strongly to the conclusion, that they were intended for the use, on that evening, of the members of the conspiracy, whose principles and purposes have already been outlined.

Second—The fact, that as soon as the trunk was opened and deposited in the hall-way, men came forward and took bombs therefrom, indicates an *expectation*, that bombs would be found at that place at that time. The prompt appearance of these

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men at No. 58 Clybourne avenue as soon as Lingg arrived there, and their immediate appropriation of the bombs placed before them, are circumstances, which tend to establish the existence of some more specific plan for the use of the bombs than that which has heretofore been pointed out. To ascertain what this specific plan was will require an examination of the events immediately preceding the explosion of the bomb at the Haymarket.

Up to the last days of April, 1886, the conspiracy, in which the defendants were engaged, was general in its character. Its object was the destruction of the police and militia of Chicago. The forces to be used in the accomplishment of this object were the International groups and such of the workingmen as could be induced to join those groups. The time, when the conflict between the workingmen and the police was to be precipitated, was about the 1st of May and in the midst of the excitement, which should prevail during the efforts of the laborers to shorten their hours of work.

The preparations for the expected conflict became more definite, as the eight-hour movement approached its culmination. Inside of the general conspiracy already described, and growing naturally out of it, a more detailed plan for securing the ends sought to be attained was originated, adopted and partially executed.

Early in the evening of May 3, 1886, the commander of the Lehr und Wehr Verein rented the basement of the building, known as No. 54 West Lake street, and also called Greif's Hall, for the purpose of holding there on that evening a meeting of the "armed sections" of the International groups.

The meeting was held in pursuance of the arrangement so made. It was secret. A guard was placed in front of the building, and another was also stationed in the rear, to prevent any entrance into the basement by outsiders.

Some seventy or eighty members of the "armed sections" from the North, South and West divisions of the city were

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present. The session lasted from eight o'clock to eleven o'clock. The members present at this gathering discussed and adopted the plan hereinafter set forth.

On the day before, that is to say, on the morning of Sunday, May 2, 1886, at ten o'clock, the members of the second company of the Lehr und Wehr Verein and of the North-west Side group had met at Bohemian Hall on Emma street in the north-western part of the city. On that occasion the defendants Engel and Fischer were both present. Engel had there submitted to this Emma street meeting "*a plan of his own conception, according to which, whenever it would come to a conflict between the police and the north-western groups, that bombs should be thrown into the police stations, and the riflemen of the Lehr und Wehr Verein should post themselves in line at a certain distance, and whoever would come out should be shot down—all those that would come out of the station or stations, he said; then it should proceed in that way until we would come to the heart of the city.*" Within the heart of the city, of course, the fight should commence in earnest." It was also arranged, that the members of the North-west Side groups should "mutually assist themselves to make an attack upon the police," and "if any one had anything with him he should use it."

This plan of Engel had been submitted by him to the Emma street gathering in the form of a resolution and had been adopted.

On the next evening, that is to say, on the evening of Monday, May 3, 1886, Engel and Fischer were also present at the meeting in the basement of Greif's Hall, and actively participated in the proceedings there taken. Among those assembled at this meeting there had been distributed a certain circular, written that afternoon by the defendant Spies, known as the "Revenge Circular." This circular will be hereafter more particularly referred to. It alleged that six working-men had been killed by the police on that very afternoon at a disturbance in the south-western part of the city, and

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called upon the workingmen to arm themselves and "avenge the atrocious murder, which has been committed upon your brothers to-day and *which will likely be committed upon you to-morrow.*"

The contents of the circular were discussed and suggestions were made as to what should be done *within the next few days*. The defendant Engel then presented to the representatives of all the groups the plan, which had been accepted, at his suggestion, on the day before by the North-west Side group alone. There was some opposition to it. One member "thought that there were too few of us, and it would be better if we would place ourselves among the people and fight right in the midst of them. There was some opposition to that, to be in the midst of the crowd, as we could not know, who would be our nearest neighbor of the crowd; there might be a detective right near us or some one else." *The plan of Engel was, however, finally adopted.* The several features of the plan adopted on Monday evening deserve special consideration, in view of the occurrences at the Haymarket on the succeeding evening.

First—As to the attacks upon the police and the police stations. It was Engel's suggestion, that the members of the armed sections should come to the assistance of the workingmen, whenever a collision between them and the police should grow out of the eight-hour strike then in progress; that a bomb should be thrown into each police station in the city, beginning with that on North avenue in the North division, and, the policemen, as they rushed out of the station on account of the explosion of the bomb so thrown, should be shot down by the riflemen of the Lehr und Wehr Verein, stationed in line for that purpose; that the police would thus be prevented from coming from their respective stations to the scene of conflict, when they should be summoned by the authorities to do so; that the different "International" bodies, after storming the stations and shooting down the police, should march

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inward towards the center of the city, destroying whatever should oppose them; that the telegraph wires, and the hose of the firemen, should be cut; that the ranks of the Internationals would gain large accessions from the workingmen, as soon as these attacks upon the police should be begun.

Second—As to the signal for the inauguration of the attacks upon the police. The defendant Fischer suggested the German word "Ruhe," the signification of which, in English, is "rest" or "peace," as a signal word to be adopted by the meeting. His proposition was agreed to. By the terms of it, whenever the word "Ruhe" should appear in the letter-box column of the "Arbeiter Zeitung," it was to be understood, that the "social revolution" had begun; the publication of that word in the paper named was to be a signal to the members of the "armed sections" of the various groups, that they were to arm themselves and repair to certain specified meeting places, and, when they should there be informed by report from a committee hereinafter named, that a collision or conflict had taken place between the police and the workingmen, they were then to proceed to attack the stations and the policemen therein with bombs and rifles, as already stated.

Third—As to the Haymarket meeting. The third feature of the meeting of the armed sections on Monday night was the arrangement made for a mass meeting on Tuesday evening at the Haymarket square. The chairman, who presided on Monday night, suggested the holding of the mass meeting on the next morning, that is to say Tuesday morning, at ten o'clock, in the Market square in the South division of the city. The defendant Fischer, however, objected to both the time and place designated by the chairman. He advocated the holding of the mass meeting on Tuesday evening rather than Tuesday morning, and at the Haymarket square instead of the Market square. His proposition was adopted by the members of the armed sections, and it was then and there agreed, that the Tuesday evening meeting should be announced

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through a hand-bill. The defendant Fischer was commissioned to have this hand-bill printed, and for that purpose, left the Monday night meeting while it was in session. He returned in about half an hour, and reported that the printing office was closed. He, however, had the hand-bill printed the next day, as will be seen hereafter.

Leaving for the present the discussion of the provisions made on Monday night for the gathering at the Haymarket, it will be necessary to notice—

Fourth—The appointment by the armed sections of a committee. As a part of the plan adopted on Monday night, a committee, consisting of one or two from each group, was appointed, the business of which was to be present at the Haymarket and “to observe the movement not only on the Haymarket square, but in the different parts of the city, and, if a conflict should happen,” to report to the members of the armed sections at their various meeting places, as above indicated. This committee was also intrusted with the task of publishing the word “Ruhe” in the “Arbeiter Zeitung,” when, in their judgment, the occasion for doing so should arise. As we understand the evidence, this same committee was to have the general control of the Haymarket meeting.

Fifth—A resolution was passed, that the details of the plan, adopted by those present on Monday night, should be communicated to absent members, who could be relied upon.

Rudolph Schnaubelt, whom a part of the evidence tends to identify as the thrower of the bomb on Tuesday night, suggested that the plan adopted should also be communicated to comrades living in other cities, so that the revolution should commence in other places as well as in Chicago. This suggestion, however, does not seem to have been acted upon by the Monday night meeting.

Returning now to a consideration of the appointment of the Haymarket meeting, considered as a part of the Monday night plan, we think the jury were warranted in believing,

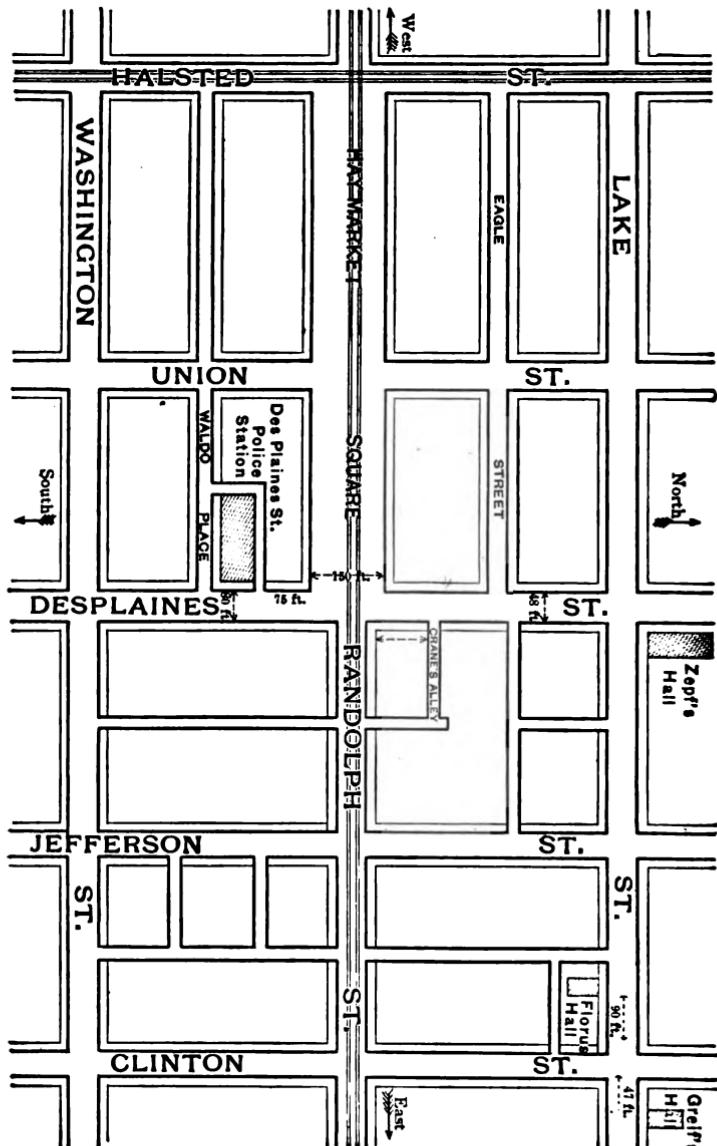
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from the evidence, that that meeting was not intended by those, who made the arrangements for holding it, to be a peaceable assemblage.

First—The resolution, which provided for calling it, was adopted by a secret gathering of the armed sections of the International groups. The record reveals many circumstances, tending to show that a conflict was to be precipitated between the police and the twenty-five thousand workingmen, who were expected to be present at the Haymarket. As one of the witnesses expresses it, it was to be held “to cheer up the workingmen so that they would be prepared if a conflict should happen.”

Second—The defendant Fischer, in the discussion on Monday night, assigned as a reason why the proposed mass meeting should not be held at Market square, that the latter place was a “mouse-trap.” This remark, under all the circumstances of the case, could have had no other meaning than that the conflict, which was expected to occur, might be too easily quelled by the authorities if it took place at Market square. If the assemblage was to be entirely peaceable and lawful in its character, it could make no difference whether the place of its meeting was a “mouse-trap” or not. That the spot selected was not a mouse-trap will appear from an examination of the locality and its surroundings, as they are shown upon the following plat or diagram:

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The Haymarket is a widening of Randolph street, which runs east and west. It begins on the east at Desplaines street and terminates on the west at Halsted street, the latter streets running north and south and crossing Randolph street at right angles.

The speakers were not on the Haymarket itself, but on Desplaines street, at a point a little more than a hundred feet north of the eastern end of the Haymarket. They made their speeches from a truck wagon, which stood on the east side of Desplaines street, next to the sidewalk, and at a point about five or six feet north of the western end of Crane's alley, the pole end of the wagon looking to the north and the rear end to the south. Crane's alley begins on Desplaines street at a point ninety feet north of Randolph street, and runs east a short distance and then turns south into Randolph street. Lake street is the next street north of and parallel with Randolph street; and between it and Crane's alley is still another alley, running east from Desplaines street to Jefferson street, and tapped at a point half way between the latter streets by an opening extending north to Lake street. Between the Haymarket on the south and Lake street on the north, a small street, called Eagle street, runs westward from Desplaines street to Halsted street, crossing Union street, which runs north and south between the two streets last named.

Between Crane's alley and the alley north of and parallel with it is the manufacturing establishment of Crane Bros., a large building, closed and unlighted at night, and in the shadow of which stood the wagon of the speakers. Some boxes had been placed on the edge of the east sidewalk of Desplaines street a few feet south of the alley, furnishing a protection from the observation of those in the middle of the street.

On Lake street, just north of the wagon, were many gathering places of the workingmen, such a Greif's Hall, Zepf's Hall and Florus Hall. There were also several such places to the

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south on Randolph street. On Tuesday night the halls and saloons in the neighborhood were crowded with workmen, who were out of employment by reason of the strikes and other disturbances, incident to the eight-hour movement, and whose feelings at this time were hostile to the police by reason of the efforts made by the latter to stop the attacks of strikers upon non-union laborers.

It will thus be seen, that all the surroundings of the wagon, in the way of streets, alleys, halls, buildings, sympathetic crowds, etc., furnished easy means of approach, escape and concealment. As a mere strategical point, no better position could have been selected for the occurrences, which actually took place on Tuesday night, than the spot, where the speakers' wagon was located.

Third—The language of the hand-bill, calling the Haymarket meeting, which was issued in pursuance of instructions from the armed sections assembled in Greif's building on Monday night, shows that the meeting was not intended to be altogether peaceable.' On Tuesday morning at a quarter past seven o'clock, Fischer went to a printing office at the corner of Randolph and Market streets, and procured the hand-bill in question to be printed. It is as follows:

ATTENTION, WORKINGMEN!

GREAT

MASS MEETING

TO-NIGHT, AT 7:30 O'CLOCK,

AT THE

HAYMARKET, RANDOLPH ST. BET. DESPLAINES AND HALSTED.

Good speakers will be present to denounce the latest atrocious act of the police, the shooting of our fellow-workmen yesterday afternoon.

Workingmen, Arm Yourselves and Appear in Full Force!

THE EXECUTIVE COMMITTEE.

The testimony is abundant, that many copies of this hand-bill, containing the words: "Workingmen, arm yourselves and appear in full force," were printed in German and Eng-

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lish and distributed among the workingmen throughout the city on Tuesday, May 4, 1886. Why urge men to come armed to an assemblage, if the assemblage is to be peaceful, especially when such arming is in violation of the law of the State?

It is true, that, at a later hour in the day, on Tuesday, a number of hand-bills were distributed, which were exactly the same as the above, with the exception that the words "Arm yourselves and appear in full force" were omitted. But the evidence shows, that the objectionable words were only left out of the second set of hand-bills, through fear that they might deter some of the workmen from attending the meeting.

All the hand-bills, however, both those with and those without the objectionable words, declared the object of the meeting to be, not to discuss the eight-hour movement, but to "denounce the latest atrocious act of the police, the shooting of our fellow-workmen yesterday afternoon." What was the act of the police on Monday afternoon for which they were to be denounced?

A manufacturing company in the south-western part of the city had employed certain laborers, belonging to organizations styled "Unions," and hence called "Union laborers." These "Union" workmen had inaugurated a strike and quit work. The company employed in their places other workmen, not connected with the "Unions," and called "Non-union" workmen. The "striking" "Union" laborers and certain "lumber shovers" had made a most violent attack not only upon the "Non-union" laborers, but upon the buildings and property of the company. The police had been summoned to quell the riot, and, as the result of their efforts to do so, one person, and not six, had died from the effect of wounds received on that occasion.

The city authorities did their duty, when they ordered the police to stop this unjustifiable attack of the union workmen, re-enforced by striking lumber-shovers, upon men, who were

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pursuing their lawful business. It follows, that the Haymarket meeting was called for the purpose of denouncing the officers of the law, because they had done their duty.

Fourth—The testimony of Waller and Seliger shows, that some trouble, not clearly defined in the language of unlearned witnesses speaking through an interpreter, was expected to take place at the Haymarket meeting. The discussions at the Monday night meeting indicated such an expectation. What other construction can be placed upon such language as this, used at that meeting: "It would be better if we would place ourselves among the people and fight right in the midst of them; we could not know who would be our nearest neighbor of the crowd; there might be a detective right near us," etc.?

One of the witnesses says, that "it was planned to attack the police stations to prevent the police from coming to aid, if there should be a fight in the city," and that those present Monday night expected there would be a fight. That this fight was expected to take place at or near the Haymarket would appear from the fact, that, as soon as the stations were blown up, the armed men and the workmen joining them should march "to the heart of the city," where the fight would commence in earnest. The Haymarket was in the heart of the city. Lingg stated to Seliger on Tuesday night "that there should be made a disturbance everywhere on the North Side to prevent the police from going over *on the West Side*." If the place, to which the police were to be kept from going by the attacks upon the stations, was in the heart of the city and on the West Side, it could not have been very far from the Haymarket square.

Fifth—The same committee, which had charge of the Haymarket meeting, and had the power to call together the armed men at their meeting places by the insertion of the word "Ruhe" in the "*Arbeiter Zeitung*," was also instructed to attend at the Haymarket and from there carry reports to

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them at their meeting places. The thing they were to report to the armed men was a conflict with the police. As they were to attend at the Haymarket and report from there, a conflict must have been expected there.

That the plan adopted on Monday night, with its provisions for bomb-throwing, shooting, meeting places, signal, committee, mass meeting, communication with absent members, etc., was an unlawful conspiracy, there can be no doubt.

The question now arises whether the murder of Degan was committed in pursuance of this conspiracy and as one of the objects to be attained by it, and whether the murder occurred while the parties to the conspiracy were engaged in such prosecution of it that Degan's death is to be considered the natural and necessary outcome and consequence of that prosecution. In other words, were the occurrences of Tuesday night the result of the conspiracy of Monday night? Was that which was done on Tuesday night done for the purpose of carrying out the plan of Monday night?

First.—The main feature of the Monday night plan was the provision for throwing a bomb into each police station and then shooting down the policemen, as they should come out. This provision had two parts: first, a bomb was to be thrown, creating destruction and confusion; second, in the midst of the confusion following upon the explosion of the bomb, the members of the armed sections and the riflemen of the Lehr und Wehr Verein were to fire into the policemen and destroy them, before they could recover from their surprise. Did this feature correspond with either or any of the events of Tuesday night? In order to determine whether it did or not, it is necessary to notice some of the occurrences, which took place at the Haymarket meeting.

The crowd in attendance there was in the middle of Desplaines street, and on the Desplaines street sidewalks to the south of the wagon, and extended around into the Haymarket to the west, and up into Lake street to the north. Those

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appearing to be most in sympathy with the speakers were near the mouth of Crane's alley and on and around the wagon.

The station, where the policemen had been holding themselves in readiness during the evening, was located on the west side of Desplaines street, seventy-five feet south of the Haymarket and some three hundred feet or more south of the wagon, and between Randolph street on the north and Washington street on the south, the latter being the next street south of and parallel with Randolph street. Some electric lights in front of a theater on Desplaines street, south of the station and in the neighborhood of Washington street, served to light up at least that portion of Desplaines street south of the Haymarket.

The police formed in line on Waldo place, a small street running west from Desplaines street and on the south side of the station house. They marched in regular order—with their hands down, clubs in their belts, and pistols in their pockets—northward upon Desplaines street, across the eastern end of the Haymarket, until they came “about to the mouth of Crane Bros.’ alley.” Here they halted, their front line being only a few feet south of the south end of the wagon. One of the officers in command then gave an order to disperse, as has already been stated.

The language, in which the order was uttered, is as follows: “I command you, in the name of the People of the State of Illinois, to immediately and peaceably disperse.” These words are the same as those used in section 253 of division 1 of the Criminal Code of this State, which provides that “when twelve or more persons, any of them armed with clubs or dangerous weapons, or thirty or more, armed or unarmed, are unlawfully, riotously or tumultuously assembled in any city, . . . it shall be the duty of each of the municipal officers . . . to go among the persons so assembled . . . and in the name of the State command them immediately to disperse.”

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If the police officers had improperly intruded upon the meeting in question, such intrusion would have furnished no justification for the attack hereinafter mentioned. Persons injuriously affected by such improper intrusion or illegal dispersion had their remedies at law for damages sustained; or they could have demanded an investigation before the proper authorities, and, upon proving their charges, could have obtained the dismissal of officers guilty of infringement upon the rights of citizens.

We can not say, however, that, in view of all the facts and circumstances surrounding the occasion, the police officers were justly chargeable with exceeding their authority in the premises. Much disturbance and disorder existed in the city. Many strikes had recently occurred among the laboring men, many of whom were out of employment and smarting under feelings of discontent. It had been reported to the authorities, that the riot already referred to of the preceeding afternoon in the south-western part of the city had been mainly incited by a speech delivered to some "lumber shovers" on the "Black Road" by the defendant Spies, who was observed to be the most active spirit at the Haymarket meeting. Copies of the "Revenge Circular" and of the hand-bill, prepared by the defendant Fischer, had fallen into the hands of the police. A rumor had also come to their headquarters that it was the intention of parties at the Haymarket meeting to proceed to some neighboring railroad freight-houses, where non-union laborers were employed, and blow them up. In addition to all this, it was reported to the officer in command of the force at the Desplaines street station, that the defendant Fielden, who was then speaking, had just used the following language: "You have nothing more to do with the law except to lay hands on it and throttle it, until it makes its last kick. . . . Keep your eye upon it, throttle it, kill it, stab it, do everything you can to wound it;" and that the use of these words had produced great excitement and caused noisy demonstra-

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tions around the wagon. Upon the reception of this report, the officer in command decided upon the dispersion of the meeting, and his men made the movement for that purpose, as already stated.

As soon as the order to disperse was given, the defendant Fielden descended from the wagon, making use of the words, "we are peaceable." Whether or not these words were uttered as the English equivalent of the German signal-word "Ruhe," which meant "peace," the evidence does not conclusively show.

Certain it is, that no sooner had Fielden said "we are peaceable" than *the bomb exploded, and, in a few seconds thereafter, a volley of shots was fired.*

Whether the crowd, which, upon the advance of the police in the middle of the street, had scattered to the north of the wagon and to the sidewalks upon the east and west sides of Desplaines street, fired into the police or not, is one of the disputed questions in the case. According to the testimony for the State, persons in the street and upon the sidewalks discharged their revolvers into the midst of the police, some of the witnesses estimating the number of shots at seventy-five or one hundred. On the other hand, witnesses for the defence swear, that the only shooting, which was done, came from the ranks of the police themselves. That the latter fired into the crowd after the explosion is an admitted fact, but the prosecution claims that they did not do so, until after they were fired into.

We think the weight of evidence is in favor of the position of the State upon this subject. If it be conceded, that the witnesses for the prosecution, who are, for the most part, policemen, are interested on one side of the question, and that the witnesses for the defence, who are, for the most part, partisans of or sympathizers with the prisoners, are interested on the other side of the question, there is yet other evidence which seems to us to be decisive of the matter.

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The testimony of the surgeons, who are entirely disinterested, shows that two police officers died from the effects of bullet wounds, and that many more, who did not die, received bullet wounds. As the policemen were a solid body of well-drilled men, standing together in the street in well-formed lines and orderly ranks, it is impossible that they should have shot into their own midst. This being so, the bullet wounds received by them, must have been caused by shots from the crowd in their front and on their sides.

In addition to this, it has already appeared that many of the persons around the wagon had been preparing for a long time for the events expected to grow out of the eight-hour movement on May 1, 1886, by exercises in drilling, by the purchase of arms, by experiments with dynamite, and had been repeatedly urged in speeches, in newspaper articles, and by the circulars already mentioned, to meet those events in a state of armed preparation.

Moreover, several of the newspaper reporters, who were present, confirm the statements of the policemen, that shots were fired from the sidewalks into the police. One of the reporters saw several men around the wagon boldly exhibiting their revolvers, while the speaking was going on. A revolver was found on the sidewalk near the wagon, several barrels of which had been discharged.

It is apparent from this review of the evidence, that just such an attack was made at the Haymarket, as was contemplated and arranged for by the conspiracy of Monday night. First, a bomb was thrown among the policemen; next, shots were fired into their ranks by armed men, belonging to the organization heretofore described and who had been gathered around the wagon during the evening. In the order of time, the shooting occurred a few seconds after the bomb exploded. This was the order, in which the onset with the two different kinds of weapons was to be made, according to the terms of

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the conspiracy. The mode of attack, as made, corresponded with the mode of attack, as planned.

It is true, that the plan adopted contemplated the throwing of a bomb into each *station* and then shooting down the police, *as they should come out*. This was to be done, however, not only at the North avenue station, but at the stations "in other parts of the city." The Desplaines street station was a station in one of the "other parts of the city," and was as much embraced within the scope of the plan as the rest of the stations. It was in sight of the speakers' wagon and only a short distance south of it. If a bomb had been thrown into the station itself and the policemen had been shot down while coming out, a part of the conspiracy would have been literally executed just as it was agreed upon. It could make no difference in the guilt of those, who were parties to the conspiracy, that the man, who threw the bomb, and his confederates, who fired the shots, waited, before doing their work, until the policemen in the station had left it and had advanced some three hundred feet north of it.

If A hire B to shoot C at the Sherman House in the city of Chicago on a certain night, but B, seeing C enter the Tremont House on the same night, shoots him there, A is none the less guilty of aiding, abetting, advising and encouraging the murder of C. If there is a conspiracy to kill policemen at a station house, but the agents of the conspiracy kill the policemen a short distance away from the station house, there is no such departure from the original design as to relieve the conspirators of responsibility.

A plan for the perpetration of a crime or for the accomplishment of any action, whether worthy or unworthy, can not always be executed in exact accordance with the original conception. It must suffer some change or modification in order to meet emergencies and unforeseen contingencies.

The International groups, as will be seen hereafter, had received information that the police intended to hold them-

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selves in readiness for the expected outbreak *at their respective stations*. The presence of one hundred and eighty policemen at the Desplaines street station, only seventy-five feet south of the Haymarket, seemed to contradict the correctness of this information, and to indicate a *concentration* instead of a *scattering* of forces on the part of the authorities. Such action by the authorities may have operated to change the original conspiracy for separate attacks upon the stations, and may have led to the concentration of a larger number of armed men at the Haymarket than was at first intended.

This appears from the language of Spies in his speech from the wagon, when he said: "It seems to have been the opinion of the authorities that this meeting has been called for the purpose of raising a little row and disturbance," etc., and when he asked "what meant this array of Gatling guns, infantry ready to arm, patrol wagons and policemen?" It appears from the excited demeanor of Schwab, who says, that he went from the "Arbeiter Zeitung" office to the Haymarket, passing through the tunnel and walking on Washington street, and that he turned from Washington street north on Desplaines street. This course would take him by the Desplaines street station, where he must have seen the policemen forming on Waldo place. Just after this, he is described by two witnesses as rushing along hurriedly and almost running into the mayor; and by one witness as engaged in a conversation a few moments later with Spies, in which the word "police" was used. Fischer and Waller, also, noticed the mounting of patrol wagons on Waldo place, and indulged in some conjectures as to what it meant. Some change of programme would also seem to be indicated by the delay in opening the meeting. It was not called to order until half-past eight or nine o'clock, although the hour stated in the hand-bills was half-past seven. It was not actually opened until Lingg had deposited the bombs at No. 58 Clybourne avenue. He was evidently slow in his preparations. Mrs. Seliger says that

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her husband and Lingg, and Huebner and Thielen, and Hermann, and some others, whose names she did not know, were at work on the bombs at her house until past seven o'clock. From the fact that Seliger and Lingg were met on the way to Neff's Hall by Muenzenberger, the blacksmith, it would appear that the latter had been sent forward to hasten their movements.

The various details here related tend to show, that some occurrence had taken place which had not been expected or provided for.

But notwithstanding the fact, that the Monday night conspiracy may have been varied somewhat to suit the new conditions, we think the jury were warranted in believing, that the bomb was thrown and the shots were fired as a part of the execution of that conspiracy.

Second — The second feature of the Monday night conspiracy was the publication of the signal-word "Ruhe" in the "Arbeiter Zeitung," an afternoon paper, issued every day at two o'clock. The word "Ruhe" *was* published in the "Arbeiter Zeitung" on the afternoon of Tuesday, May 4, 1886, about five hours and a half before the hour for which the Haymarket meeting was called. It appeared in the letter-box column in heavy type and heavily underscored. Its publication announced the arrival of the "social revolution." It was a call issued to the "armed sections" to arm themselves and repair to their meeting places and await orders. Here certainly was an execution of a part of the conspiracy shortly before the opening of the meeting, at which the murder of Degan took place.

It is clear that the publication of the word "Ruhe" in a German paper might not be notice to the armed members of the American group, who presumably could not speak or read German. The "Alarm" at this time was only issued every half month. Accordingly, on Tuesday afternoon, at about the same time when the word "Ruhe" appeared in the "Ar-

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beiter Zeitung," there also appeared in one of the afternoon English papers of the city the following notice: "American group meets to-night, Tuesday, 107 Fifth avenue. Important business. Every member should attend; 7:30 o'clock sharp. Agitation Committee."

The question which here naturally suggests itself, is: Was there a gathering of the armed men at their meeting places in obedience to the call, implied in the word "Ruhe?"

The evidence does not disclose how many meeting places there were, nor the location of all of them.

The meeting place selected for the members of the Northwest Side group would appear to have been Wicker Park. But whether they actually met there on Tuesday night, or whether the arrangement for their doing so was given up in view of some alteration of plan, such as has already been hinted at, the record does not disclose. A large number of the members of this group were at the Haymarket on that evening.

According to the testimony of Seliger as to the declarations of Lingg, Greif's Hall, or 54 West Lake street, was a designated meeting place for some of the armed men. This hall was crowded on Tuesday night with workingmen, many of whom went over to the Haymarket.

It was only two blocks east from Desplaines street, and distant only a few minutes' walk from the wagon of the speakers. A gathering there was, in effect, a gathering at the Haymarket itself.

The meeting place for the American group on that evening was the "Arbeiter Zeitung" office, at 107 Fifth avenue. Twelve or fifteen members of that group met there pursuant to the published notice.

At least six of those present, including the defendants Parsons and Fielden, belonged to the armed section.

They all left and came over to the Haymarket meeting some time between half-past eight and nine o'clock Tuesday evening.

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The meeting place of many of the armed members of the North Side group on Tuesday evening was Neff's Hall. Lingg, Seliger, Lehmann, Smideke, Thielen and others were there on that evening between eight and half-past nine o'clock.

Many went there to get bombs. Thielen, who had received two loaded bombs, some cartridges, and two cigar boxes full of dynamite from Lingg on that afternoon, was there a considerable portion of the evening, and is spoken of by Neff as "hanging around out in front of the saloon on the sidewalk."

We think the evidence warrants the conclusion, that 58 Clybourne avenue was one of the meeting places, to which the members of the armed sections repaired in pursuance of the arrangement made on Monday night.

Some of the meeting places were to be at certain "corners." The armed men were to go from their meeting places to attack the stations. They were to attack the stations, in order to prevent the policemen from getting out of them so as to go to the scene of conflict, when they should be summoned. Hence, many of the meeting places would be near the stations.

One of the stations to be attacked, and which was specifically named at the Monday night assemblage, was the North avenue station. The evidence shows, that Lingg, Seliger, Lehmann, Smideke, Thielen, and two large men, belonging to the Lehr und Wehr Verein, all of whom were armed with bombs, were seen standing and moving between eight and ten o'clock on Tuesday night, at corners and on streets in the near neighborhood of the North avenue station.

Seliger and Lingg were also that night still further north in the neighborhood of a police station near the corner of Webster and Lincoln avenues. Others, who left 58 Clybourne avenue just after the bombs had been deposited there, "went ahead" of Seliger and Lingg, so that the course taken by them must have been still further northward and in the neighborhood of Deering, where the defendant Schwab made

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a speech to some striking workingmen about ten o'clock on that night after he had left the Haymarket.

One or more of these meeting places or corners was in the neighborhood of the Desplaines street station. A group of about twenty-five men were standing, on Tuesday evening, at the south-west corner of Halsted and Randolph streets, two blocks west of the Desplaines street station, and one of the witnesses speaks of seeing Spies and Schwab going into the thickest of this group between eight and nine o'clock. "About an hour previous to the meeting" at the Haymarket, Engel and Fischer, both members of the armed sections, were seen at the corner of Desplaines and Randolph streets. During the evening Fischer and Waller, the latter of whom is proven to have had a revolver, and both of whom belonged to the Lehr und Wehr Verein, were so near the Desplaines street station as to observe the mounting of five or six patrol wagons with policemen. The speakers' wagon itself was only a short distance north of that station, and armed men were gathered around it all the evening, as has already been shown.

Thus it is proven, that armed men did gather at certain corners and meeting places on Tuesday night. There is evidence, which would warrant the jury in believing, that such gatherings took place in obedience to the call agreed upon at the Monday night meeting.

Third—The third feature of the Monday night conspiracy was the appointment of a mass meeting at the Haymarket. The meeting was held and its general character has already been discussed.

Fourth—The fourth branch of the conspiracy had reference to the action of the *committee*, that was charged with the double duty of publishing the signal-word "Ruhe" and of reporting to the armed men at their meeting places any conflict or collision that might occur at the Haymarket or elsewhere. Did this committee attend at the Haymarket and carry reports

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thence to those gathered at the "corners" and other meeting places?

Upon the reception of these reports, attacks were to be made upon the police. The thing to be reported was any collision or conflict, that might happen to occur between the police and the workingmen. Such collisions ordinarily grew out of attempts to protect employers or non-union laborers against strikers. But that an act of interference with a meeting of workingmen would be regarded as coming within the meaning of the word "conflict" or "collision," as here understood, is apparent from Lingg's statement, made to Seliger when he first brought a bomb to the latter's house and showed him pipes and shells. This statement was, that the bombs would be used not only "on occasions of strikes," but "where there were meetings of workingmen and they should be disturbed by the police."

At the Haymarket the collision grew out of an attempt to disperse a meeting that appeared to have been called for an illegal purpose. The movement of the police upon the crowd for the purpose of effecting this dispersion was such a coming together of policemen and workingmen, as would very naturally be construed by many of the conspirators or their unlearned agents to be within the meaning of the Monday night plan. To regard the advance of the police into the midst of those standing around the wagon as authorizing and justifying the attack contemplated by the terms of the Monday night conspiracy was a natural interpretation of those terms, in view of all the circumstances and of the character of the parties concerned.

As the march to the wagon and the order to disperse did not occur, until the station had been left, the police were out of the station, before the occasion for the attack arose, and hence the throwing of the bomb into the station itself was an unnecessary act.

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Even if it be true, that the committee already named made no report to the armed men at their meeting places, as contemplated by the terms of the conspiracy, it may be said that such report was unnecessary, so far as those posted near the Desplaines street station were concerned. The only object of such reports was to give information of a conflict or collision. The armed men at the Haymarket themselves saw the collision and heard the order to disperse, and were therefore informed of the arrival of the occasion for an attack without any report from the committee.

However this may be, the evidence tends to show, that certain parties did go from the Haymarket to one or more of the meeting places on Tuesday night, and that they so went, as bearers of some message or communication. Whether the communication, suggested by this passage of persons from point to point, had any reference to the large gathering of policemen at the Desplaines street station, does not appear.

Belthazar Rau, the advertising agent of the "Arbeiter Zeitung," was one of the most active men in the promotion of the schemes of the Internationalists. As has already been stated, he exhibited a specimen bomb in August, 1885, to the central committee in session at the "Arbeiter Zeitung" office, when Seliger was present as a delegate. The written copy of the words "Y.—Komme Montag Abend," published in the "Die Fackel" on Sunday, May 2, and calling the meeting of the armed men on Monday night, was in his handwriting. He introduced Spies to the chairman of the meeting of the lumber shovers on Monday afternoon. He distributed the "Revenge Circular" Monday evening at Zepf's Hall. He knew the meaning of the signal "Ruhe," and, according to the testimony of Spies, talked with the latter about it on Tuesday afternoon. On Tuesday night he was seen moving among the crowd on the Haymarket. On that evening he made two trips between the "Arbeiter Zeitung" office and the Haymarket, once in company with Schwab, and again in com-

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pany with Fielden, Parsons and Snyder. He was seen at Zepf's Hall just after the explosion. He was in consultation with Spies, Schwab, Fricke and others at the "Arbeiter Zeitung" office on Tuesday afternoon between five and seven o'clock; and, on Tuesday morning between nine and ten o'clock, he was present at the same place with Fischer, Spies, Schwab and Grueneberg at an interview in reference to the hand-bills heretofore mentioned. Gruenhut speaks of him as being on an agitation committee and on the committee for the Internationalists. Special mention is made of him by Herr Most in his letter to Spies.

This same Rau on Tuesday night went from the Haymarket to the meeting of the American group then in session at the office of the "Arbeiter Zeitung," and, in obedience to a notice from him, all those gathered there went over to the speakers' wagon on Desplaines street.

Parsons, in speaking of what took place at the "Arbeiter Zeitung" office, says: "Some one, I understood it was a *committee*, came over from the Haymarket; they stated that they came from the Haymarket or some one told me they did." Fischer stated after his arrest, that he was at the "Arbeiter Zeitung" office that night, and he was a member of the executive committee, that called the Tuesday night meeting, as shown by the signature to the hand-bill.

Thus there is evidence, from which the jury were warranted in believing, that Fielden and Parsons and their associates were called from their meeting place to the Haymarket by the summons of a committee.

Furthermore, about eight o'clock or a little before that time on Tuesday evening, the defendant Schwab was at the office of the "Arbeiter Zeitung," and several telephone messages passed between him and a letter-carrier of that paper in the north-western part of the city. He went over to the Haymarket and, leaving there later in the evening, took a Clybourne avenue car at the court house, and went to Deering,

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at or near the corner of Clybourne and Fullerton avenues. When he arrived at his destination, he was standing on the back platform of the car. During his journey he passed by No. 58 Clybourne avenue, where men had just been helping themselves from the open satchel of loaded bombs, where Lingg had just inquired of Neff, the saloon-keeper, if "some one had been there asking for him," where Thielen, who had been with Lingg that afternoon, while he was making bombs, was "hanging around . . . out in front of the saloon on the sidewalk." During this journey, he passed the intersection of Larrabee street and Clybourne avenue about the time when Seliger, Lingg, Smideke and Lehmann were standing there. He passed the intersection of North avenue with Clybourne avenue a short distance west from the North avenue station, which had been especially singled out for attack. His course was near the spot, where two large men, armed with bombs, members of the Lehr und Wehr Verein, had been seen standing on that night, and from which they had gone ahead towards the north. It was said at the Monday night meeting, that, when the police stations should be attacked, the Internationals hoped to gain accessions from the workingmen. Schwab went late on Tuesday evening to address several thousand "striking" workingmen, assembled at a point not a great distance north from the stations visited on that evening by Seliger and Lingg, and, in order to reach the point in question, went directly by the meeting place of the North Side group, to which he himself belonged, and among the corners where armed members of that group had been hovering all the evening, as if in expectation of some order or signal.

There is no direct or positive evidence, that he passed by No. 58 Clybourne avenue and the corners in its neighborhood, as a member of the committee referred to, for the purpose of summoning to the Haymarket some one or more of those, who had helped themselves to Lingg's bombs. But there are circumstances, which, taken in connection with all the other

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evidence in the case, point very strongly in the direction here indicated.

The evidence of the defence tends to show, that Schwab's trip to Deering had no other object than an address to the workingmen, that Rau's visit to the "Arbeiter Zeitung" was for the sole purpose of getting speakers for the Haymarket, and that the American group met at the office of the "Arbeiter Zeitung" on that evening to effect an organization of the sewing-girls. It was for the jury to say whether the evidence of the defence upon this subject was of greater weight than the various circumstances already detailed, which, we think, the jury had a right to look at in the light of the principles advocated by the International organization, and in the light of the peculiar methods, recommended by that organization for concealing its real designs. The "Arbeiter Zeitung," in its instructions "about revolutionary deeds" as found in its issue of March 16, 1885, says, that where a special group is formed for the purpose of action, the *public groups* "*have to serve as a covering, as a shield behind which one of the most effective weapons of revolution is bared;*" that "*the danger of discovery ought to be weakened as much as possible, and, if it can be, should be reduced to naught.*"

Fifth—The fifth feature of the plan under consideration was the resolution to communicate its details to absent members.

The record furnishes no direct evidence upon this subject, but it shows that persons, who were present at the meeting on Monday night, were in the company of several of the defendants on Tuesday and Tuesday night. Rudolph Schnau-belt was in consultation with Schwab and Spies on Tuesday night, and was on the wagon that evening with Fielden and Parsons. During the day on Tuesday Rau and Fischer were in the "Arbeiter Zeitung" building with Spies and Schwab, and were there in the evening while Fielden and Parsons were in attendance upon the gathering of the American group.

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We have thus reviewed somewhat in detail a number of the events of Tuesday night with a view of seeing whether they took place in accordance with and in pursuance of the provisions of the Monday night plan. Viewed as evidences of a correspondence between what was done and what was planned, some of the occurrences here noted may be unimportant, but taking all the circumstances together, the jury were justified in finding that the actors upon the stage of Tuesday night's tragedy were playing the parts assigned to them in the conspiracy of the previous night, and that the death of Degan occurred as a part of the execution of that conspiracy, and while the parties to it were engaged in carrying it out.

The last and most important question to be considered is: Were the plaintiffs in error parties to the conspiracy formed on the evening of Monday, May 3, 1886?

Lingg:

The jury were warranted in believing from the evidence, that the plaintiff in error Louis Lingg, was a party to the Monday night conspiracy.

According to the testimony of the captain of the police, Lingg admitted after his arrest, that he was present on that evening in the basement of Greif's Hall. If he was, then his presence there, taken in connection with his subsequent conduct, would tend strongly to establish his connection with the plot. It is claimed by the defence, that he was in attendance all the evening at a meeting of the carpenters' union at Zepf's Hall on Lake street at the north-east corner of Lake and Desplaines streets, two blocks west of Greif's Hall and about half a block north of the spot where the speakers' wagon was located on the next night. He certainly was at Zepf's Hall during a part of the evening, but may have gone over to the other meeting in session at Greif's Hall. A public announcement was made to those assembled in Zepf's Hall, requesting all who belonged to the armed sections to go over to the

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basement of 54 Lake street. Schrade says he went to the latter place from the gathering of the carpenters' union because of an announcement that "the members of the L. u. W. V. should go around to the meeting on Lake street." This announcement certainly informed Lingg, that the armed sections were in session at a place just two blocks east of him.

It would make no difference, however, in view of his acts and declarations whether he was at the meeting Monday night or not. "Though the common design is the essence of the charge of conspiracy, it is not necessary to prove, that the defendants came together and actually agreed in terms to have that design and to pursue it by common means. If it be proved, that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same, so as to complete it, with a view to the attainment of that same object, the jury will be justified in the conclusion, that they were engaged in a conspiracy to effect that object." 3 Greenleaf on Evidence, sec. 93.

Let us examine some of Lingg's acts and declarations:

The plot of Monday night required the use of bombs to carry it into effect; Lingg and his assistants were making bombs on Tuesday. He brought dynamite to Seliger's house on Friday, but made no preparations to fill bombs with it until the day of the Haymarket meeting. He knew all about the details of the conspiracy. On Tuesday night he told Seliger the meaning of the word "Ruhe," and that its insertion in the paper had been provided for in the meeting of the previous night. He took a copy of the paper at Seliger's house and showed him the signal-word in the letter-box column. On Monday night about the time the meetings at Zepf's Hall and Greif's Hall were adjourning, he came up behind Lehmann and several other members of the armed sections, who were standing on the sidewalk at the entrance to Greif's Hall, and reproached them for their stupidity, call-

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ing them fools and oxen. When Lehmann, who had been standing guard most of the evening on the outside to prevent intruders from entering the basement, asked him what had taken place at the meeting they were just leaving, he said in reply, that if they wanted to know something they should come to 58 Clybourne avenue the next evening. Lehmann did go to 58 Clybourne avenue the next evening in obedience to this injunction. As has been already stated, Lingg carried loaded bombs there and spread them out, so that members of the International groups could help themselves to them. His remark to Lehmann shows that what he did on Tuesday night was done in pursuance of a resolution formed on Monday night. Thielen, Hermann, Huebner and Lehmann, who were with him on Tuesday afternoon, while he was making bombs, were all present at the Monday night meeting.

We regard it as a very significant circumstance, as showing the connection between the conspiracy of Monday night and the bomb-making of Tuesday afternoon, that parties who are proven without any contradiction whatever to have been at the meeting in the basement of Greif's Hall on Monday night and to have belonged to the band of conspirators that met there, went to Seliger's house on the very next afternoon and were there associated with Lingg in making the bombs that he carried to Neff's Hall Tuesday night.

It was as late as eleven o'clock on Monday night when Lingg told Lehmann and several other members of the armed sections to come the next night to Neff's Hall. It was as early as seven o'clock on the very next morning when he set Seliger to drilling holes in the bomb shells and instructed him to get bolts to fasten the shells together, accompanying his instructions with the statement, that the bombs would be taken away that day.

Lingg said on Tuesday afternoon, while he and his assistants were at work at the bombs, that they were to be carried to 58 Clybourne avenue as soon as they were finished and

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were to be used that night, and that they were "going to be good fodder for the capitalist and the police when they came to protect the capitalists." When he returned to Seliger's house from the West Side at one o'clock on Tuesday, he reproached Seliger with the slow progress he had made in his work.

It may be here stated, that six weeks before this time, when Lingg first brought dynamite to Seliger's house, he remarked that every workingman should have dynamite and learn to handle it, as there was to be considerable agitation.

Between nine and ten o'clock on Tuesday night Lingg and Seliger appeared before the North avenue station, and Lingg proposed to Seliger to throw a bomb into the station and shoot down the policemen, two of whom were sitting in front of the building. Whether their failure to carry the proposition into effect proceeded from a want of courage, or from disappointment at not receiving some message or signal, that was expected at Neff's Hall, is not disclosed by the evidence. But the proposition itself bears a startling resemblance to the first and main feature of the Monday night plot as already noticed.

Lingg's conduct during Tuesday and on Tuesday night shows, that he expected a disturbance to occur Tuesday evening. He and Seliger and Lehmann and Smideke were standing on Larrabee street near Clybourne avenue about half past nine o'clock, when either Lingg or Seliger remarked that "we should not keep together, we four," and then we went apart." He became wild with excitement after the patrol wagon, manned with policemen, had passed him and he had been unable to light his bomb soon enough to throw it at the wagon. After that, during the evening, he frequently referred to what was going to happen on the West Side and at the Haymarket, and was with difficulty restrained by Seliger from going to the West Side.

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Seliger swears, that he was present at the meeting of the carpenters' union on Monday night and was there at the same time with Lingg; he also states, that, before he went, he learned that there was to be a meeting at the Haymarket on the night of the 4th of May. It would thus appear, that Fischer's proposition to hold a mass meeting at the Haymarket was the subject of consultation and arrangement among the members of the groups, before he went to the gathering of the armed men on Monday night.

The proof discloses two circumstances, occurring after the explosion of the bomb on Tuesday night, which tend to show Lingg's connection with the Haymarket crime. About eleven o'clock on that evening the Lehmanns, the Hermanns, the Hagemanns and Hirschberger, the librarian, were in Neff's saloon. Some of them had just come from the Haymarket and they were talking about the explosion of the bomb. In the midst of their conversation Lingg and Seliger entered the saloon, when one Hermann said in an energetic voice to Lingg: "You are the fault of all of it" or, "that is your fault." Thereupon, a subdued conversation took place between Hermann and Lingg. This circumstance is sworn to by both Seliger and Neff, and is competent testimony as against Lingg.

After this, when Seliger and Lingg were on their way home from Neff's saloon, Lingg "made the remark that he was even now scolded—chided—for the work he had done."

The details of the plan adopted on Monday night, as the same are herein set forth, are proven by testimony which is uncontradicted. The evidence introduced by the prosecution as to the acts and declarations of Lingg on Tuesday and Tuesday night and during several weeks prior thereto, is also uncontradicted by any testimony offered on the part of the defence, so far as we have been able to discover. What are the inferences to be drawn from these uncontested facts? The jury, who are the judges of the facts in criminal as well

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as in civil cases, have a right to draw from proven circumstances such conclusions as are natural and reasonable.

The intentions of men can only be determined from their acts. "Murder is the unlawful killing of a human being, in the peace of the people, with malice aforethought, either expressed or implied." (Criminal Code, sec. 140.) We said, in *Davison v. The People*, 90 Ill. 221: "Malice is always presumed, where one person deliberately injures another. It is the *deliberation*, with which the act is performed, that gives it character. It is the opposite of an act, performed under uncontrollable passion, which prevents all deliberation or cool reflection in forming a purpose."

Here is a man, connected with a certain organization, engaged in arming and drilling for a conflict with the police. He is experimenting with dynamite and in the construction of bombs under the direction of armed members of that organization. He makes bomb shells, fills them with dynamite, takes them to the meeting place of armed members of that organization, puts them where access to them can be easily had, using such precautions as such dangerous explosives naturally require. At once, certain of these armed members, such as the two large men of the Lehr und Wehr Verein already spoken of, come forward and take bombs and go their several ways. In a little more than an hour afterwards, one of these very bombs is thrown into a crowd of policemen and explodes and kills one of them. Was not the conduct of this man, who thus coolly and carefully prepared the weapons for one definite class of men to use in the murder of another definite class of men, marked by "deliberation," as that term is defined in the authorities?

It was a fair conclusion from the evidence that Lingg *knew* that the bombs he was making would be thrown among the police. It was a fair conclusion from the evidence, that he *intended* the bombs he placed in the hall-way to be used by the members of the International groups, not only in the in-

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terest of the general movement against the police with which he was connected, but in the interest of the particular conspiracy, that was concocted on Monday night.

Even if he did not know the name of the particular individual who was to throw the bomb, he knew that it would be thrown by some one belonging to the sections or groups already described, and this was sufficient to affect him with the guilt of advising, encouraging, aiding or abetting the crime charged in the indictment.

He may not have known what particular policeman would be killed, whether Matthias J. Degan, or another. But when he opened the loaded satchel at Neff's Hall on Tuesday night, that act, viewed in the light of all the antecedent, attendant and subsequent occurrences, was virtually a designation of the body or class of men, who were to be attacked. When one of such class was killed, the guilt was the same as though a person bearing a particular name had been pointed out as the victim.

Even if he did not know that one of the bombs would be thrown on that evening at a particular place called the Haymarket, it was sufficient that he knew it was to be used at that point in the city, where a collision should occur between the workingmen and the police. Such a collision did occur at the Haymarket.

Counsel for the defence claim, that there is no proof showing the bomb to have been thrown by any one of the members of the organization, for whose use Lingg may have made it; that the bomb may have been thrown by some person outside of that organization and having a private grievance of his own against the police; in other words, that the bomb-thrower has not been identified as a member of the conspiracy or as a person employed by it or acting in its interest.

We think, however, that the jury were justified in believing from the evidence, that the man, who threw the bomb, was either a member of the conspiracy, or an agent employed by it. This appears from the facts already recited. Three circum-

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stances especially served to identify him as being connected with the conspiracy. First, the bomb, that exploded, was one of the bombs made by Lingg; second, the bombs made by Lingg were finished and distributed so short a time before the explosion, that they could hardly have been obtained elsewhere than from his possession, or by others than those for whose use he intended them; third, the throwing of the bomb occurred almost at the same time with the firing of the shots; the latter followed so closely upon the former, that the two can not be regarded otherwise than as parts of a joint attack, showing that the man, who threw the bomb, and the men, who fired the shots, were acting in unison with each other; this negatives the idea of independent action by an outside individual having a private grudge; the character of the attack as a joint one and the concert of action between those making it identify it as that kind of an attack, which the conspirators planned to make. Moreover, there is no evidence in the record of the making of bombs by anybody except Lingg and those associated with him.

Engel and Fischer:

As to the defendants Engel and Fischer, it has already been shown, that they originated the Monday-night plan and procured its adoption first by the North-west Side group and second company of the Lehr und Wehr Verein on Sunday morning, and afterwards by the representatives of all the groups on Monday night. They advised and induced a band of seventy or eighty armed and drilled men to enter into a plot to murder the police with bombs and pistols in a certain contingency, and to agree to certain details as to committee, signal-word, mass meeting, hand-bill, meeting places, etc., with a view of carrying that plot into effect. The murder of Degan took place as the legitimate consequence of an attempt to accomplish the objects of the conspiracy originated and planned by themselves. Therefore they aided, abetted, advised and

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encouraged the commission of that murder. Both were present at the Haymarket meeting on Tuesday night.

The evidence tends to show that Engel was at his home on Milwaukee avenue near the Haymarket, when the explosion occurred. That some of the conspirators might be at home, when the collision with the police should happen, was a contingency that was provided for by the terms of the plot; in the event of a collision at night, the committee appointed to watch the movement was to report to the armed men at their homes.

It has already been stated, that Fischer was at the Haymarket early in the evening, and was seen walking about on Desplaines street and in front of the station, and was present while Fielden, the last speaker, was talking. There is testimony on the part of the prosecution tending to show that he was in the neighborhood of the wagon and near the mouth of Crane's alley, when the bomb was thrown. There is also testimony on the part of the defence tending to show, that at that time he was in the saloon at Zepf's Hall. Zepf's Hall was just a few steps north of the wagon and in sight from it. The hall was crowded that night with workmen, and on the upper floors several meetings, among others that of the furniture workers, were in session. Between it and the Haymarket persons were passing back and forth. Fischer may have stepped into the saloon a few moments before the explosion and may have been there at the precise moment of its occurrence, although one of the newspaper reporters, who was in the saloon at the time, says he did not see him.

It would make no difference, however, in the degree of responsibility, with which Engel and Fisher are chargeable under the facts already narrated, that they were not actually among those who stood around the wagon, when the bomb was thrown. Where persons combine to stand by one another in a breach of the peace with a general resolution to resist all opposers, and, in the execution of their design, a murder is committed,

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all of the company are equally principals in the murder, though at the time of the act, some of them were at such a distance as to be out of view, if the murder be in furtherance of the common design. Wharton on Homicide, (2d ed.) sec. 338; *Williams v. The People*, 54 Ill. 422.

On the morning after the Haymarket massacre about ten or eleven o'clock the defendant Fischer was arrested while coming down the stairs of the "Arbeiter Zeitung" building. The officer found upon his person a 44-caliber, self-acting revolver loaded and also a file. He wore a belt and sheath under his coat, the belt having a brass buckle upon it with the letters "L. & W. V.," a buckle of the Lehr und Wehr Verein society. "The file, an old-fashioned, three-cornered file, ground to a sharp edge, very sharp on the point, with a wooden handle, was in the sheath; the revolver was stuck in a slit in the belt; there were ten cartridges in his pocket; there was also a fuse cap—a fulminating cap—in his pocket; the fulminating cap was bright." At Fischer's house after his arrest were found a box of nearly fifty 44-caliber cartridges and a light blue blouse, such as is worn by the Lehr und Wehr Verein.

Spies and Schwab:

We will now consider the relations of the defendants Spies and Schwab to the Monday night plot.

By the terms of the plot, the word "Ruhe" was to be published in the "Arbeiter Zeitung" as a signal to the members of the armed sections to arm themselves and gather at their meeting places, there to be ready to attack the police when the committee appointed should give information of a disturbance. That word *was* published in the paper, which was issued on the afternoon of Tuesday, May 4. Its publication was the act of the defendant Spies. He wrote with his own hands the words "*Brief Kasten—RUHE*"—the former of which means "letter-box" in German—and, from the original manuscript so written by himself, the printers set up the type from

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which the words were printed in the paper of Tuesday afternoon. "Ruhe" was not only in his handwriting, but he underscored it twice, as if to give it greater emphasis and prominence. If he knew its meaning as a signal-word and the object of its insertion in the paper, as explained on the night before by his own foreman, the defendant Fischer, then he was lending himself by its publication to the execution of the plan of Monday night. "Nor is it necessary to prove that the conspiracy originated with the defendants, or that they met during the process of the concoction; for every person entering into a conspiracy or common design, already formed, is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design."

3 Greenleaf on Evidence, sec. 93.

There is evidence tending to prove, that Spies inserted this word in the International organ as a member of the committee, whose business it was to do so, because that same committee was in charge of the Haymarket meeting, and he was the most active man in the management of that meeting. He himself inserted among the editorial notices in the "Arbeiter Zeitung" on Tuesday afternoon the following notice in almost the same words used in the hand-bill, printed by Fischer: "Attention, workingmen! Grand mass meeting this evening at half-past seven o'clock on the Haymarket, Randolph, between Desplaines and Halsted streets. Good speakers will denounce the latest rascally deed of the police in killing our brethren yesterday afternoon, in shooting our brethren yesterday afternoon." He organized the Haymarket meeting and addressed it. He mounted the wagon and called for Parsons. He selected, as the speaker's stand, the wagon with all its advantages of location, as already specified. He moved among the workingmen on the Haymarket and pressed them north into Desplaines street to the neighborhood of the wagon so selected. In his address he spoke confidently as to the intentions of the committee, charged with the double duty already

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indicated, saying among other things: "The committee that called the meeting wanted to tell you certain facts," etc.

In explanation of the publication of the word "Ruhe," the defendant Spies swears that its meaning was stated to him for the first time by Rau, his advertising agent, and Fischer, his foreman, on Tuesday afternoon after its appearance in the paper, and that he instructed them to speak to the armed men of its insertion at that time, as a mistake. Rau and Fischer were not placed upon the stand to confirm this explanation, and whether it was credible, in view of his printed utterances on that day and several previous days and in view of all the other features of his conduct, as disclosed in the record, was a matter for the jury to determine. If they did not believe his explanation as against the evidence, which tended to contradict it, then they were justified in finding, from the circumstances already mentioned and those hereafter stated, that he was as much a party to the plot as Engel and Fischer and Lingg.

That plot, as has already been shown, contemplated the throwing of a bomb into each police station, and then, in the confusion, using fire-arms against the policemen. In an article upon the riot of Monday afternoon, written by the defendant Spies and published in the same Tuesday afternoon edition, in which the word "Ruhe" appeared, he says: "If brothers, who defended themselves with stones (a few of them had little snappers in the shape of revolvers) had been provided with *good weapons and one single dynamite bomb, not one of the murderers would have escaped his well-merited fate.*" Here is a suggestion of that very mode of attacking the police, which was the main feature of the Monday night conspiracy. This suggestion was made to the workingmen Tuesday afternoon. Tuesday night the very thing suggested took place, that is to say, a bomb was thrown not into a station, but among the police a few feet from a station, and, after it was thrown, "good weapons" were fired into them, killing several

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and wounding several more. The article in question did not stop, however, with a *suggestion* of an attack upon the police in the mode specified. It closed by saying: "Last night thousands of copies of the following circular were distributed in all parts of the city," and then quoted and re-published in full the German portion of the "Revenge Circular," that had been composed by Spies and distributed among the working-men on Monday night, thereby urging such workingmen in the most vehement terms to arm themselves and make war upon the police. A translation of this German circular is given hereafter.

The reason why the plan of Monday night provided for throwing a bomb into each police station and shooting the escaping policemen was that the latter might be thereby prevented from going to the scene of the disturbance, which was expected to take place. Such plan would naturally be based upon information, that the police intended to hold themselves in readiness at their stations for a summons to some point of conflict. On the afternoon of April 30, 1886, being the Friday preceding the Tuesday, on which the Haymarket meeting occurred, the "Arbeiter Zeitung," in an editorial written by one or the other of its two editors, Spies and Schwab, thus addressed its three thousand six hundred readers among the members of the International groups and the unions of the workingmen :

"As we are informed from reliable source, the police have received secret orders to keep themselves prepared in their stations, as a labor conflict is feared on Saturday of next week. You see the capitalistic sluggards are thirsty for the blood of workingmen. The workingmen will not permit themselves to be kicked by them like dogs any more. They will not be tortured to death any more by unlimited work, and they will not be starved any more. For this opposition they want vengeance and they cry for blood. May be that this cry will be heeded—but then, beside the red life-sap of the extor-

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tioner's victim, there may flow a little of the black-dragon poison of the extortioner. *To the workingmen we again say at this hour, arm yourselves. You have but one life to lose. Defend that with all means. And in this connection we want to caution the armed workingmen as yet to conceal their arms so that they will not be stolen by the minions of the law, as it has happened in various instances.*"

Here was a statement that the police had "received secret orders to keep themselves prepared in their stations" for a labor conflict expected to occur in about a week, which statement was accompanied with a caution to the workingmen to arm themselves and to conceal their arms. The injunction to arm could have had no other object than to meet the preparations which the police had received secret orders to make. Such preparations could be of no avail, if the stations should be blown up and the police themselves should be shot down. Therefore, the plan of Monday night was exactly adapted to rendering the action of the police in keeping themselves prepared in their stations useless and of no effect. So exactly does the plan in question fit the state of things spoken of in the editorial of April 30, that it would appear to have been suggested by that editorial.

When it is remembered, that, on the very day on which this editorial made its appearance, Lingg brought to Seliger's house the large box of dynamite, already alluded to, and that, on the next Sunday morning, Fischer, who, as foreman of the "Arbeiter Zeitung," was all the time at work under the eyes of Spies and Schwab, went in company with Engel to a meeting of the second company of the Lehr und Wehr Verein and the North-west Side group, where the plan for destroying the stations and their occupants was adopted upon the suggestion of Engel, it would appear, that the defendant Spies and Schwab not only joined the conspiracy now under discussion *after* it was formed, but inspired the conception of it *before* it was formed.

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The armed men, who met and entered into that conspiracy on Monday evening, were called together by the "Arbeiter Zeitung" of which Spies and Schwab were the editors and managers. In the edition, called "Die Fackel," issued on Sunday May 2, and in the issue of the afternoon of Monday, May 3, there were published, in the letter-box column, the words: "Y.-Komme Montag Abend" ("Y.-Come Monday night.") This was a summons to the armed sections to meet, as they did, on Monday night at Greif's Hall. The original manuscript, from which the words were printed for the Sunday issue, was in the handwriting of Rau, advertising agent of the "Arbeiter Zeitung," member with Spies of the bureau of information, and distributor for Spies of the "Revenge" circular. The printing of the call twice, on both Sunday and Monday, indicated the importance of the matters to come before the meeting.

In his testimony, Spies says of the "Revenge" circular: "I wrote it to arouse the working people, who are stupid and ignorant, to a consciousness of the condition that they were in." In the circular as above quoted he uses the words: "Avenge the atrocious murder, which has been committed upon your brothers *to-day* (Monday,) and which will likely be committed upon you *to-morrow*" (Tuesday.) In the minds of "stupid and ignorant" workmen, already excited about the eight-hour day of labor, the language here quoted could mean nothing else than that an attack, similar to the one, which took place in the south-western part of the city on Monday, would probably be made upon the workingmen by the police on Tuesday.

Again, in the issue of the "Arbeiter Zeitung" published on Sunday May 2, it is said: "Everything depends upon quick and immediate action. The tactics of the bosses are to gain time; the tactics of the strikers must be to grant them no time. *By Monday or Tuesday the conflict must have reached its highest intensity, else the success will be doubtful.* Within a

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week the fire, the enthusiasm will be gone, and then the bosses will celebrate victories." Here is another designation of *Tuesday* as the day when the excitement would be the most intense. The conduct of Spies and Schwab during the few days preceding May 4 and on that day, as evinced by their utterances in the "*Arbeiter Zeitung*" and otherwise, shows a constant effort to increase the enthusiasm to the highest pitch.

They advised "stupid and ignorant" workingmen to arm themselves, and then sought by vehement appeals to urge them on to "quick and immediate action." For instance:

On Wednesday, April 28, they said: "The power of the associate manufacturers and their state must be met by labor associations. The police and soldiers, who fight for that power, must be met by armed armies of workingmen; the logic of facts requires this; arms are more necessary in our times than anything else. Whoever has no money, sell his watch and chain to buy fire-arms for the amount realized. Stones and sticks will not avail against the hired assassins of the extortionists. *It is time to arm yourselves.*"

On Thursday, April 29, they said: "If the legitimate means of the thieves and scoundrels, who practice extortion on their fellow-men, are exhausted, then they resort to force. *A wage slave, who is not utterly demoralized, should always have a breech-loader and ammunition in his house.*"

On Friday, April 30, they said what has already been quoted from the editorial of that date, and on the same day they further said, in another article: "What will the 1st of May bring? The workingmen bold and determined. . . . Men of labor, so long as you acknowledge the gracious kicks of your oppressors with words of gratitude, so long you are faithful dogs. . . . *They are enraged, and will attempt, through hired murderers, to do away with you like mad dogs.*"

On Saturday May 1, they again said to the workingmen in the "*Arbeiter Zeitung*": "Away with all rolls of membership and minute books where such are kept. *Clean your guns,*

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complete your ammunition. The hired murderers of the capitalists, the police and militia, are ready to murder. No workingman should leave his house in these days with empty pockets."

On Sunday, May 2, in the same editorial, which urged quick and immediate action, and designated Monday or Tuesday, as the time when the conflict would have reached its highest intensity, they used the following language: "Everywhere the workingmen are willing to accept a corresponding reduction of wages with the introduction of the eight-hour system, they were mostly refused. 'No, ye dogs; you must work ten hours; that's the way we want it, we're your bosses.' Something like this was the answer of the majority translated into intelligible language. In the face of this fact, it is pitiful and disgusting, but more than that, *it is treacherous, to warn the strikers against energetic, uncompromising measures.*"

On Monday, May 3, in another article in the "Arbeiter Zeitung," they said: "The freight handlers were marching in full force from depot to depot at noon to-day. It was rumored, that 'scabs' had been imported from Milwaukee. The railroad depots are occupied by special policemen, while the municipal minions of order under the command of five lieutenants have entrenched themselves in the armory. The arch-rascals have made provisions for good victuals and drink. . . . A strike will probably take place in the lumber districts. . . . The number of strikers to-day can not be determined, but will probably amount to *forty thousand*. Courage, courage is our cry. Don't forget the words of Herways: *The host of the oppressors grows pale, when thou, weary of thy burden, in the corner putttest the plow, when thou sayest 'it is enough.'*"

But there were other occurrences during the same period, which tended to incite the workingmen to an attack upon the police.

While Fischer, the first foreman in the compositor's room of the "Arbeiter Zeitung," was present at the Sunday morning meeting on Emma street, Urban, a compositor of the "Arbeiter

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Zeitung," was attending a meeting of the Central Labor Union at No. 54 West Lake street in a room back of the saloon. Spies was present at a second meeting of the Central Labor Union at the same place in the afternoon of the same Sunday.

It was arranged at these morning and afternoon gatherings of the Central Labor Union that Spies should address the meeting of the striking lumber shovers, to be held the next afternoon on the "Black road," in the near neighborhood of a large manufacturing establishment in the south-western part of the city.

On Monday afternoon the meeting in question took place. It has already been referred to. The lumber shovers were "on a strike" and met to hear reports from certain committees, whom they had appointed to negotiate with their employers in reference to the eight-hour movement. The immense crowd in attendance upon this occasion was addressed by Spies, as has already been stated. He spoke in the German language from the top of a freight car. His manner was excited and his gestures were violent. One of the witnesses says, that while speaking "he jumped up three or four feet high." About three blocks west from the place where he was speaking was situated the factory which was employing non-union laborers as heretofore explained. The lumber shovers at the meeting were not connected in any way with the workingmen engaged at the factory. But when the latter came out of the factory gate about three o'clock in the afternoon at the ringing of a bell an attack was made upon them by several thousand of the lumber shovers who rushed from the freight car towards the gate, before the speaking was finished, in obedience to an order from some one on the car. A conflict ensued. The police were called out. Stones were thrown, clubs were used, and pistols were fired by both the crowd and the police. Some of the policemen and several of the workingmen were wounded. One of the latter was killed, as has been heretofore mentioned.

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It is admitted by the defendant Spies, that, upon this occasion, he urged the workingmen, many of whom were armed with revolvers, to resist the attempt of the police to quell the riot. In an account of what took place, written by himself and published on the next afternoon (Tuesday, May 4) in the "Arbeiter Zeitung," he says:

"The writer of this hastened to the factory as soon as the first shots were fired and a comrade urged the assembly to hasten to the rescue of their brothers, who were being murdered, but no one stirred. . . . The writer ran back. He implored the people to come along—those who had revolvers in their pockets, but it was in vain. With an exasperating indifference they put their hands in their pockets and marched home, babbling as if the whole affair did not concern them in the least. The revolvers were still crackling and fresh detachments of police, here and there bombarded with stones, were hastening to the battle ground. The battle was lost!"

On Tuesday afternoon Spies inserted in his paper a call for the Haymarket meeting in order to denounce the action of the police at this very riot. The Haymarket meeting was thus nothing more than a continuation of the warfare on the police, which he himself had incited and taken part in on Monday afternoon.

After his return from the "Black road" to the "Arbeiter Zeitung" office on Monday afternoon May 3, 1886, he wrote in English the following address, all of which, except the word "Revenge" at the top, is proven to have been in his handwriting:

"REVENGE.

"Workingmen, to Arms!!

"The masters sent out their blood-hounds—the police; they killed six of your brothers at McCormick's this afternoon. They killed the poor wretches, because they, like you, had the courage to disobey the supreme will of your bosses. They killed them because they dared ask for the shortening of the

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hours of toil. They killed them to show you, '*free American citizens*,' that you must be satisfied and contented with whatever your bosses condescend to allow you, or you will get killed!

"You have for years endured the most abject humiliations; you have for years suffered unmeasurable iniquities; you have worked yourself to death; you have endured the pangs of want and hunger; your children you have sacrificed to the factory lord—in short, you have been miserable and obedient servants all these years! Why? to satisfy the insatiable greed, to fill the coffers of your lazy, thieving masters! When you ask them now to lessen your burdens, he sends his blood-hounds out to shoot you—kill you! *If you are men, if you are the sons of your grandsires, who have shed their blood to free you, then you will rise in your might, Hercules, and destroy the hideous monster that seeks to destroy you. To arms, we call you, to arms!*

YOUR BROTHERS."

He at the same time wrote an address in the German language, of which the following is a translation:

"REVENGE! REVENGE!

"*Workmen, to Arms!*

"Men of labor, this afternoon the blood-hounds of your oppressors murdered six of your brothers at McCormick's. Why did they murder them? Because they dared to be dissatisfied with the lot which your oppressors have assigned to them. They demanded bread, and they gave them lead for an answer, mindful of the fact that thus people are most effectually silenced. You have, for many, many years, endured every humiliation without protest, have drudged from early in the morning till late at night, have suffered all sorts of privations, have even sacrificed your children. You have done everything to fill the coffers of your masters—everything for them! And now, when you approach them and implore them to make your burden a little lighter, as a

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reward for your sacrifices, they send their blood-hounds, the police, at you, in order to cure you, with bullets, of your dissatisfaction. Slaves, we ask and conjure you, by all that is sacred and dear to you, avenge the atrocious murder which has been committed upon your brothers to-day, and which will likely be committed upon you to-morrow. *Laboring men, Hercules, you have arrived at the cross-way. Which way will you decide? For slavery and hunger, or for freedom and bread? If you decide for the latter, then do not delay a moment, then, people, to arms! Annihilation to the beasts in human form who call themselves rulers! Uncompromising annihilation to them! This must be your motto. Think of the heroes whose blood has fertilized the road to progress, liberty and humanity, and strive to become worthy of them!*

YOUR BROTHERS."

These two addresses were printed, one in the English and the other in the German language, upon the same sheet of paper and one above the other, as one circular. The printers in the "Arbeiter Zeitung" office usually stopped work at five o'clock in the afternoon. On this particular Monday afternoon, however, five or six of them were detained to set up the type for this circular. By direction of Spies the form was sent across the street to a printing office at No. 88 Fifth avenue. The order was given to strike off as many as possible. Twenty-five hundred copies were printed that evening. As soon as they came from the hands of the printer they were carried away. "A dozen different parties came there after them, coming one and two at a time, taking it as fast as it came from the press."

These circulars were distributed on Monday evening at various places and in different parts of the city.

One of the witnesses says: "It was a few minutes after six o'clock . . . on Monday afternoon. I was standing in the doorway of the entrance of 54 West Lake street, talking with the proprietor of the hall, and first had my attention

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attracted to a circular by seeing a few of them flying through the air, and remember distinctly picking up one and reading it at the time. Just at the moment I saw a horseman, and the distribution of the circulars was coincident with the appearance of the horseman in front of 54 West Lake street. My impression was that the horse was ridden west on Lake street." Later in the evening, the circulars were handed around at Greif's hall in the saloon and at the meeting of the armed sections, which was in session in the basement. On the same night there was a gathering of the members of the carpenters' union to the number of one thousand or eight hundred men at Zepf's Hall at the corner of West Lake and Desplaines streets, as heretofore stated, and the "Revenge" circulars were brought there and distributed by Rau, the advertising agent of the "Arbeiter Zeitung." Between nine and ten o'clock, the defendant Neebe carried a number of copies to a saloon at the corner of Franklin and Division streets in the North division of the city and laid some on the counter and some on the tables as hereafter stated.

A copy was seen by one of the witnesses at a meeting that night of the metal-workers at No. 99 West Randolph street.

Another witness says that he was walking west on Randolph street Tuesday evening about half-past seven o'clock, and somebody handed him a circular headed "Revenge" and signed "Your brothers."

That this circular gave impulse to the action of the members of the armed sections at the Monday night meeting and inspired the adoption of the plan agreed upon, is apparent from the fact, that its contents were fully discussed and dwelt upon at that meeting.

The witness Gruenhut says, that he was at the "Arbeiter Zeitung" office between five and seven o'clock on Monday afternoon; that Schwab and the book-keeper and Neebe (though he is not so sure about the latter) were present while Spies was writing the "Revenge" circular and reading the

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proof-sheets of it as they came from the hands of the printer; that Spies told them of the lumber shovers' riot, from which he had just come, and of the killing of six men by the police, and deplored the fact that the workingmen had not been better armed for their defence, favoring the use of dynamite as the most effective mode of arming; that the calling of a mass meeting was then discussed and agreed upon among them, and it was agreed that the meeting should be held at night and be in the open air; that the circulars, which Spies was preparing, were to be printed "for distribution for the mass meeting;" that the Haymarket meeting held Tuesday night was the meeting talked about and agreed upon on that Monday afternoon.

Grueneberg says, that he saw Fischer in the compositors' room of the "*Arbeiter Zeitung*" as late as half-past five o'clock on Monday evening, and when it is remembered that Fischer went to the meeting at Greif's Hall that night and induced the armed men to agree to the holding of an open-air meeting on Tuesday night at the Haymarket, and himself printed and caused to be circulated a hand-bill, calling on the workmen to come armed to that meeting, and when it is further remembered, that the signal-word "Ruhe," which the armed men that night agreed upon at his suggestion, was next day written by Spies with his own hand and published in the "*Arbeiter Zeitung*" on Tuesday afternoon, the jury certainly had reasonable ground for believing, that the action of Fischer on Monday night was taken in consequence of and pursuant to the arrangements decided upon between Spies, Schwab and others at the "*Arbeiter Zeitung*" office Monday afternoon.

This conclusion receives confirmation from the character of the articles, which appeared in the "*Arbeiter Zeitung*" on Tuesday afternoon.

The following editorial published on May 4, 1886, and called the "To arms" editorial, was written by the defendant Schwab:

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"Blood has flowed. It happened as it had to. Order has not drilled and disciplined her murdering hounds in vain. The militia has not been drilled in street fighting for mere sport. The robbers, who know best themselves what a mean rabble they are, who keep up their mammon by rendering the masses wretched, who make the slow murdering of laboring men's families their vocation, they are the last to be afraid of directly butchering the laboring men. 'Down with the rabble,' is their watch-word. Is it not an historical fact, that private property has had its origin in acts of violence of all sorts? And shall the 'rabble,' the laboring men, allow this capitalistic pack of robbers to carry on, through hired assassins, their bloody orgies? Nevermore! The war of classes has come. In front of McCormick's factory workmen were shot down yesterday, whose blood cries for vengeance. Who will any longer deny, that the ruling `tigers are thirsting for the workman's blood? Countless victims have been slaughtered upon the altars of the golden calf amidst the triumphant shouts of the capitalistic band of robbers. One has only to think of Cleveland, New York, Brooklyn, East St. Louis, Ft. Worth, Chicago and countless other places, in order to recognize the tactics of the extortioners. It is: 'Terror to our working cattle.' But the laborers are not sheep, and the white terror will be answered with the *red*. Do you know what that means? Very well, you will find that out yet.

"Modesty is a vice of the workingman, and can there be anything more modest than this eight-hour demand? Peaceably the workmen made it already a year ago, in order not to neglect to give the extortioner opportunity to prepare for it; and the answer to this was: to drill the police force and the militia and to browbeat the laborers, who worked in favor of the eight-hour system. And yesterday blood flowed. This is the manner, in which these devils reply to a modest petition of their slaves.

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"Death rather than a life of wretchedness! If workmen must be shot at, well then let us answer them in a manner which the robbers will not soon forget again. The murderous capitalistic beats have become drunk with the smoking blood of laborers. The tiger lies ready for the jump; his eyes sparkle eager for murder; impatiently he whips his tail, and the sinews of his clutches are drawn tight. Self-defence causes the cry: 'To arms!' 'To arms!' If you do not defend yourselves, you will be torn in pieces and ground by the animal's teeth. The new yoke which awaits you in case of cowardly retreat is heavier still and harder than the severe yoke of slavery as it exists now.

"All the powers, hostile to the workmen, have been (made) common cause. They recognize their common interest. They have the necessary class-consciousness. In such days as ours are, everything else must be subordinated to this one thought: How can the thieving —— together with their gangs of hired murderers, be made harmless?

"The whole newspaper gang makes up the lie to-day that the strikers, who were in the neighborhood of McCormick's factory yesterday, were the first to fire. That is a bold bare-faced lie on the part of the journalistic ragamuffins. Without any warning whatever, they fired at the workmen, when they, of course, returned the fire. Indeed, why should they make so much ado about the rabble? To be sure, if they had been sheep or cattle instead of human beings, one might have reflected a little before shooting. But as it was, a laboring man is quickly replaced, and the gluttons then at their rich dinners and in the circles of their mistresses boast of the splendid achievements of law and order.

"In the poor shanty, miserably-clad women and children are weeping for husband and father. In the palace they touch glasses filled with costly wine and drink to the happiness of the bloody bandits of law and order. Dry your tears, ye poor

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and wretched; take heart, ye slaves; arise in your might and overthrow the system of robbery, present order based on robbery."

The following is a portion of the article already quoted from, which was written by the defendant Spies and published in the "Arbeiter Zeitung" on Tuesday, May 4, 1886:

"Six months ago, when the eight-hour movement began, there were speakers and journals of the I. A. A. who proclaimed and wrote: 'Workmen, if you want to see the eight-hour system introduced, arm yourself. If you do not do this you will be sent home with bloody heads and birds will sing May songs upon your graves.' ('That is nonsense,' was the reply.) 'If the workmen are organized they will gain the eight hours in their Sunday clothes.' Well, what do you say now? Were we right or wrong? Would the occurrence of yesterday have been possible if our advice had been followed?

"Wage-workers, yesterday the police of this city murdered at the McCormick factory, so far as it can now be ascertained, four of your brothers, and wounded, more or less seriously, some twenty-five more. If brothers who defended themselves with stones (a few of them had little snappers in the shape of revolvers) had been provided with good weapons and one single dynamite bomb, not one of the murderers would have escaped his well-merited fate. As it was, only four of them were disfigured. That is too bad. The massacre of yesterday took place in order to fill the forty thousand workmen of this city with fear and terror—took place in order to force back into the yoke of slavery the laborers who had become dissatisfied and mutinous. Will they succeed in this? . . . About seventy-five well-fed, large and strong murderers, under the command of a fat police lieutenant, were marching toward the factory, and on their heels followed three patrol wagons besides, full of law and order beasts; two hundred policemen were on the spot in less than ten or fifteen minutes, and the firing on fleeing workingmen and women re-

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sembled a promiscuous bush-hunt. . . . A few of the strikers had little snappers of revolvers, and with these returned the fire. . . . With their weapons, mainly stones, the people fought with admirable bravery. They laid out half a dozen blue-coats, and their round bellies, developed to extreme fatness in idleness and luxury, tumbled about, groaning on the ground. Four of the fellows are said to be very dangerously wounded; many others, alas! escaped with lighter injuries. (The gang, of course, conceals this, just as in '77 they carefully concealed the number of those who were made to bite the dust.) But it looked worse on the side of the defenceless workmen. Dozens who had received slight shot wounds hastened away amid the bullets which were sent after them. The gang, as always, fired upon the fleeing, while women and men carried away the severely wounded. How many were really injured and how many were mortally wounded could not be determined with certainty, but we think we are not mistaken when we place the number of mortally wounded at about six and those slightly injured at two dozen. We know of four, one of whom was shot in the spleen, another in the forehead, another in the breast, and another in the thigh. A dying boy, Joseph Doedick, was brought home on an express wagon by two policemen."

Also in the issue of the "Arbeiter Zeitung" of Tuesday, May 4, 1886, appeared the following:

"An outbreak was expected on the South-west Side this morning. A regiment of militia and the whole municipal gang of murderers were held in readiness. Just stir, ye free workmen of America, if you want to be shot down."

In the same issue of the "Arbeiter Zeitung" of May 4, 1886, also appeared the following:

"The heroes of the club dispersed with their cudgels yesterday in the most brutal manner a crowd of girls, many of whom had scarcely outgrown their baby shoes. Whose blood does not rush quicker through the veins when he hears of

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this atrocity of the minions of the law? He, who is a man, show it these days. Men, to the front!

"The armory on Lake Michigan is guarded by militia tramps. The youngsters say they are fully equipped. Should the anarchists venture an attack from any point, they would find a warm reception. Well, as long as the youngsters are in their barracks, they will probably not be molested. But if they appear in the streets, circumstances might be altered."

The "Alarm" and the "Arbeiter Zeitung" were more than mere newspapers to the members of the International Association. They were the organs of that association. The members looked to these papers for orders and directions. More especially was this the case with the "Arbeiter Zeitung" and its German readers. The record contains many evidences of this fact.

The seventy or eighty armed men who assembled in the basement of Greif's Hall and their absent confederates, who were to be informed of their conspiracy, were to look for the word "Ruhe" in the "Arbeiter Zeitung." From that paper they were to learn when the social revolution had come and when they were to assemble for conflict. This showed, that they were in the habit of reading that paper and consulting it. When a special meeting of the armed sections was desired, they, who belonged to those sections, found the signal-words, calling them together, in the "Arbeiter Zeitung." This implied that they were readers of that paper. The seventy or eighty men just referred to went to Greif's Hall, because they saw the summons to go there in their organ. Some of them testify that they went there for that reason, and there is no evidence, that they received any other notice of the Monday night meeting than the one published in the "Arbeiter Zeitung." The assemblage of seventy or eighty of them there may be regarded as proof that seventy or eighty of them read the paper in question on Sunday and Monday.

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Many witnesses in this case, both for the State and for the defence, who testify to their membership in the International Association, testify also to the fact that they were in the habit of reading one or the other of the two organs here referred to.

Waller, a member of the Lehr und Wehr Verein, who presided at the gathering in the basement of Greif's Hall, and who was armed with a revolver at the Haymarket on Tuesday night, says that he saw the word "Ruhe" in the "Arbeiter Zeitung" at six o'clock Tuesday afternoon in a saloon on Milwaukee avenue, and that on Monday he saw the words "Y.—Komme Montag Abend" in the same paper.

When Lingg desired to explain to Seliger the disturbance, that was expected on the West Side, he went to the "Arbeiter Zeitung" and showed the word "Ruhe."

Without going further into the testimony, we think the jury were warranted in believing, that most of the editorials in these papers, which were generally in the form of appeals or addresses to the workingmen, were read at least by those of the workingmen, who belonged to the groups herein mentioned. More especially were these organs consulted during the excitement of the eight-hour movement, when information as to the progress of that movement was eagerly sought after among the classes affected by it.

As already stated, the weight of the evidence is in favor of the conclusion that Degan was killed by some member of the International Association. It was for the jury to say, how far that fatal result may have been brought about through the influence of the utterances, put forth by the organs here designated.

As late as Tuesday afternoon Spies said to the workingmen in an editorial in his paper, proven to have been written by himself: "Then do not delay a moment; then, people to arms! Annihilation to the beasts in human form, who call themselves rulers!"

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As late as Tuesday afternoon, Schwab said to the working-men in an editorial in the same paper, proven to have been written by himself: "The murderous capitalistic beats have become drunk with the smoking blood of laborers. The tiger lies ready for the jump; his eyes sparkle eager for murder; impatiently he whips his tail, and the sinews of his clutches are drawn tight. Self-defence causes the cry: 'To arms! To arms!' If you do not defend yourselves you will be torn in pieces and ground by the animal's teeth."

"He, who inflames people's minds and induces them by violent means, to accomplish an illegal object, is himself a rioter, though he take no part in the riot." *Regina v. Sharpe*, 3 Cox's C. C. 288.

"One is responsible for what of wrong flows directly from his corrupt intentions. . . . If he set in motion the physical power of another, he is liable for its result. If he contemplated the result, he is answerable, though it is produced in a manner he did not contemplate. . . . If he awoke into action an indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible." 1 Bishop on Crim. Law, sec. 641.

We conceive that it can make no difference, whether the mind is affected by inflammatory words addressed to the reader, through the newspaper organ of a society to which he belongs, or to the hearer through the spoken words of an orator, whom he looks up to, as a representative of his own peculiar class. *Queen v. Most*, L. R. 7 Q. B. D. 244.

It was a question for the jury, whether, with the evidence before them, the attack upon the police at the Haymarket "was so connected with the inflammatory language used, that they can not be separated by time or other circumstances."

We do not wish to be understood as deciding, that the influence of these publications in bringing about the crime at

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the Haymarket could be considered by the jury if they were the *only* evidence of encouragement of that crime, which was furnished by the record. We only hold, that the jury were at liberty to consider the publications in question in connection with all the other facts and circumstances of this particular case and as a part of those facts and circumstances, with a view of determining whether the defendants, who were responsible for their issuance, did or did not belong to the conspiracy now under consideration.

It has already been stated, that the defendant Schwab was present at the Haymarket a part of Tuesday evening, but left and went to Deering, where he made a speech. What he said in that speech is not disclosed by the record. The proof shows, that those, who called the Haymarket meeting, expected an attendance of twenty-five thousand workingmen at that place. As matter of fact only about two thousand came. Several thousand had assembled at Deering. That Schwab went to Deering and there addressed some of the workingmen, who were expected at the Haymarket but failed to come, would in nowise lessen his responsibility for the death of Degan, if his acts and declarations, as heretofore and hereafter noticed, helped to cause that death. If he belonged to the same conspiracy with Degan's murderer and the murder of Degan was perpetrated in furtherance of that conspiracy, then the act of the murderer was his act. It is to be noted that he did not go to Deering, until he first went to the Haymarket and had a consultation with one or more of the leaders, who had control of matters at the latter place. But a further consideration of this branch of the case will be postponed for the present.

Spies spoke to the crowd at the Haymarket. One of the witnesses says that, in his speech, he dwelt upon the occurrences of Monday afternoon at the lumber shovers' meeting and the part he took in them, and then "advised the using of violent means by the workingmen to right their wrongs; that

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law and government were the tools of the wealthy to oppress the poor; that the ballot was no way in which to right their wrongs; that by physical force was the only way in which they could right their wrongs."

The following is another portion of his speech, as testified to by a witness, who heard it:

"The fight is going on. Now is the chance to strike for the existence of the oppressed classes. The oppressors want us to be content; they will kill us. The thought of liberty which inspired your sires to fight for their freedom ought to animate you to-day. The day is not far distant when we will resort to hanging these men. (Applause, and cries of 'hang them now!') _____ is the man who created the row Monday, and he must be held responsible for the murder of our brothers. (Cries of 'hang him.') Don't make any threats. They are of no avail. Whenever you get ready to do something, do it, and don't make any threats beforehand. There are in the city to-day between forty and fifty thousand men locked out because they refused to obey the supreme will or dictation of a small number of men. The families of twenty-five or thirty thousand men are starving because their husbands and fathers are not men enough to withstand and resist the dictation of a few thieves on a grand scale, to put out of the power of a few men, to say whether they should work or not. Would they place their lives, their happiness, everything out of the arbitrary power of a few rascals? . . . To say whether you shall work or not, you place your lives, your happiness, everything, out of the arbitrary power of a few rascals, who have been raised in idleness and luxury upon the fruits of your labor. Will you stand that?"

Still another witness says: "He talked about the police, the blood-hounds of the law shooting down six of their brothers, and he said: 'When you get ready to do something, do it, and don't tell anybody you are going to.' . . . At the time Mr. Spies was showing them how the officers came down

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the 'Black road' and commenced shooting into the crowd of workingmen . . . they appeared very much excited in the neighborhood of the wagon and in the neighborhood, where they hallooed out: 'Let us hang them.'"

The observations, hereafter made in regard to the speech of the defendant Parsons and its effect, apply also to this speech of the defendant Spies.

The evidence thus far commented upon in reference to the acts and declarations of the defendants Spies and Schwab, is such, that the jury were warranted in finding them to be parties to the conspiracy. In addition, however, to the facts and circumstances already noticed, there was other testimony, introduced by the State for the purpose of proving that the defendants Spies and Schwab, either one or both of them, gave the bomb, that killed Degan, into the hands of the person, who threw it, and aided him in his murderous design.

Malvern M. Thompson testifies, that he saw Spies and Schwab together in Crane's alley on the night of the Hay-market meeting and heard the words "police" and "pistols" uttered in a conversation between them; that Spies said to Schwab: "Do you think one is enough or hadn't we better go and get more?" that they came out of the alley and walked together west on Randolph street to the south-west corner of Randolph and Halsted streets where they entered the thickest of a crowd of about twenty-five men, remaining there some three minutes and then returning to Desplaines street; that, on the way back, the word "police" was again used, and Schwab said to Spies: "Now, if they come, we will give it to them;" that, upon their return, Rudolph Schnaubelt met them on the sidewalk near the wagon and Spies handed Schnaubelt something which the latter put in his pocket on the right-hand side; that Spies then mounted the wagon and began to speak; that just after him Schnaubelt also mounted the wagon and sat upon it with his hands in his pockets until Fielden began to speak, when the witness left.

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The witness did not know what it was that was handed to Schnaubelt, but, upon the assumption that he tells the truth, it was evidently something that was to be used against a body of policemen, and as a bomb with a projecting fuse is made to be thrown into a crowd of men, the jury, looking at the circumstance here noted in the light of all the other facts and circumstances developed by the testimony in the case, were warranted in believing that the thing given to Schnaubelt was a bomb. Therefore, the evidence of Thompson, if true, tends very strongly to convict Spies and Schwab of aiding and abetting the crime of the Haymarket.

Schwab testifies, that, while he was at the "Arbeiter Zeitung" office on that evening, a call came through the telephone for a speaker to address the meeting at Deering, and that he at once went over to the Haymarket to consult with Spies about it; that he failed to find Spies and did not see him or talk with him at all; that he met Schnaubelt, his brother-in-law, and, after talking with him about sending a speaker to Deering, concluded to go himself; that he thereupon took a Randolph street car and went east to the court house, there boarding a Clybourne avenue car for the north.

The testimony in regard to the matters, about which Thompson testifies, is very conflicting. There is much, that tends to confirm him, and much that tends to contradict him.

First—As to the proof tending to confirm Thompson. It is established beyond question, that Schwab went to the Haymarket for the express purpose of seeing Spies; that Schnaubelt was at the Haymarket until after ten o'clock and was on the wagon with Spies, Parsons and Fielden; that Spies *did* walk in company with *somebody* from the wagon westward on Randolph street for the avowed purpose of finding Parsons, who had been seen before eight o'clock at the corner of Randolph and Halsted streets, and *did* return along Randolph street to the wagon in company with the same person, who started with him.

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The statements of Owen and Heineman and of Spies and Schwab themselves, when analyzed and compared, show that Schwab was at the Haymarket that evening for at least half an hour and that Spies was there at the same time. Other testimony shows that Schnaubelt was there at the same time.

Thompson is confirmed in many particulars. He says that "Schwab came rushing along Desplaines street in a great hurry." Owen also says: "Schwab came up and almost run into the mayor before he saw him."

Thompson says that, just after seeing Schwab, he crossed to the east side of Desplaines street, went north towards Lake, then returned southward, saw Spies get on the wagon and heard him ask if Parsons was present, then, while he was standing at the entrance to the alley, saw Spies, after his descent from the wagon, go with Schwab for a few moments into the alley, etc. Owen says, that, when Schwab saw the mayor at the corner of Desplaines and Randolph streets, he "immediately upon that turned about and went north on Desplaines street." It thus appears, that Schwab was seen going in the direction of the alley, where Thompson claims to have seen the meeting between him and Spies, and at about the time when that meeting is claimed to have been witnessed. Schwab says himself that he "went across Randolph street and north of Randolph on Desplaines I met my brother-in-law, Rudolph Schnaubelt."

Cosgrove says: "I saw Mr. Schwab there before the meeting began. I saw him there just after the time Mr. Spies returned. . . . The first time I saw him was about forty feet south of Randolph on Desplaines street on the west side of the street. The last time I saw him was at the wagon—it was about half-past eight."

McKeough says: "I saw Schwab on the wagon in the early part of the evening and a man named Schnaubelt. . . . Spies started away then and officer Meyers and I followed him as far as the corner. There was a man with him, who,

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I think, was Schwab. I saw Schwab there in the early part of the evening. I lost sight of him finally somewhere in the vicinity of half-past eight o'clock. After that I did not see him at all during the entire evening. . . . He got on the wagon, I think, before the meeting started and tapped Mr. Spies on the shoulder and said something to him. *I saw him at the side of the wagon, talking to Spies.*" Freeman, a reporter, also says that he thought he saw Schwab on the wagon.

The person, who thus spoke to Spies on the wagon and who was Schwab according to McKeough's evidence, is said by Spies to have been one Schroeder. Spies also says, that the man, who started away with him towards the corner of Desplaines and Randolph streets, was Schnaubelt. As McKeough speaks of seeing Schnaubelt on the wagon, he must have known him, and he does not refer to Schnaubelt as being with Spies when the latter went off to the west.

The south end of the wagon was only a few feet from the mouth of the alley, and if Schwab and Spies did step into the alley and utter the few words, which Thompson claims to have heard, it could all have been done in a few seconds before they started towards Randolph street.

The utterance of the words "pistols" and "police" at that time and under those circumstances was natural, as Schwab had just passed the Desplaines street station, and he must have seen what Sahl, one of the witnesses for the defence, says that he saw at about a quarter before eight o'clock, namely "three patrol wagons, manned with police and about one hundred to one hundred and fifty men drawn up in the rear of the patrol wagons on Waldo place." That this created such an excitement among those interested in the Haymarket meeting as would have given rise to the expressions which Thompson claims to have heard, is manifest from the language used by Spies and Parsons in their speeches.

The conversation between Spies and Schwab, as sworn to by Thompson, would indicate a knowledge of the place where

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bombs were to be had. Schwab belonged to the same North Side group, engaged in arming for May 1, to which Seliger and Lingg belonged. Seliger, one of the bomb-makers, was a member of the central or general committee, which held its meetings every two weeks in the library room in the rear of Schwab's office at the "Arbeiter Zeitung" building. Schwab says that he started from his house No. 51 Florimond street to his office on Tuesday night at twenty minutes before eight. At that time Lingg and Seliger were preparing to leave 442 Sedgwick street to take the bombs to Neff's Hall.

The remark "Now, we will give it to them," would imply that, if Spies and Schwab gave Schnaubelt a bomb, they obtained it from some one among the twenty-five men, into whose midst they went at the corner of Halsted and Randolph streets. The most direct route to the Haymarket from No. 58 Clybourne avenue is south on Larrabee street to Chicago avenue, west on Chicago avenue to Halsted street and south on Halsted to Randolph street. It is proven in this record, that on Tuesday night a patrol wagon went from the corner of North avenue and Larrabee street—a point considerably north of 58 Clybourne avenue—to the Haymarket in eight minutes by the route here indicated. From the precautions, which the record shows to have been necessary in the handling of these bombs, they could not have been carried safely and comfortably on a street car without attracting attention. If they had been brought in a wagon of any kind or by a person on foot from Neff's Hall to the Haymarket along the route traveled by the patrol wagon, one of the corners of Halsted and Randolph streets would have been a very natural place to look for them. There is evidence in the record, tending to show, that several of Lingg's assistants in the matter of making bombs were at the Haymarket meeting.

Second—As to the proof tending to contradict Thompson.
Spies and Schwab both swear that they not only did not talk

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together or walk together at the Haymarket meeting, but that they did not see each other on that evening.

Henry W. Spies also contradicts Thompson, but we regard his evidence, as seriously weakened by his cross-examination. He testifies on his direct examination as follows: "While the speaking was going on I was standing right alongside of the wagon. . . . I stood there during the entire meeting. . . . I saw Fielden getting off at the back end of the wagon. I told my brother (August Spies, the defendant) to get off and reached my hand over to him to help him jump. He took my hand. . . . Just at that time the explosion took place. . . . As he jumped, somebody jumped behind him with a weapon right by his back, and I grabbed it, and, in warding off the pistol from my brother, I was shot." On his cross-examination he says: "On the 6th of May I was arrested at my house by officers Whalen and Lowenstein. I told them, that, when the bomb exploded, I was at Zeff's Hall, walked out and was shot in the door. I told them that I was not at the Haymarket at all from beginning to end. That was not true when I told it to them. I lied to them. . . . I also said, that I did not see my brother that evening until he called at the house and asked me if I had a good physician. I now state that what I then said about that was not the truth."

Richter says, that he was standing at about the middle of the mouth of the alley and saw Spies on the wagon, when he asked "Is Parsons here?" but did not see him go into the alley after he descended from the wagon. He says, however, that he did not notice on which side of the wagon Spies alighted, nor in what direction he went after leaving the wagon.

Lindinger says, that he did not see Spies or Schwab enter the alley, but he also says, that, after Spies called for Parsons, he descended from the wagon on the north side, and "I didn't follow him only until he was down off the wagon."

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So with Liebel—he says that he did not see Spies enter the alley. But he also says, that he did not see in what direction or where Spies went after he left the wagon.

Sahl's testimony tends more strongly to contradict Thompson than that of the other witnesses. He says that he knew Spies and Schwab and had heard them speak at Greif's Hall and Zepf's Hall; that he saw Spies on the wagon and heard him ask for Parsons; that Spies, after he came down from the wagon, passed witness in company with two or three other persons and that Schwab was not one of them. Sahl was at the time in the middle of the street in a south-westerly direction from the wagon in the crowd of persons standing there.

Thompson's testimony is positive in its character and he is unimpeached as a witness, while that of the defence upon this subject is, for the most part, negative in character.

The jury had a right to consider the evidence of Spies and Schwab in the light of the facts, that they were both on trial for murder and that their statements on the stand were inconsistent with and contradictory of previous declarations, made by them. 1 Greenleaf on Evidence, sec. 462, note a.

The prosecution introduced a witness by the name of Harry L. Gilmer. If the testimony of this witness is true there is no doubt but that the defendant Spies is guilty of the murder of Degan. He swears that Spies struck a match and lighted the fuse of a bomb in the hand of Rudolph Schnaubelt, and that Schnaubelt at once, as soon as Spies had applied the match, threw the bomb into the midst of the police.

Gilmer says, that he came to the Haymarket meeting at about a quarter before ten o'clock; that he had been on the South Side and was going to his home on the West Side and stopped at the meeting on his way; that he went up from Randolph street on the east side of Desplaines, while Fielden was speaking, and stood between the lamp-post, on the south-east corner of the alley and Desplaines street, and the wagon

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near the east end of the wagon ; that he stepped back into the alley on the north side thereof and noticed some parties opposite him on the south side of the alley, who were talking in German and whose conversation he did not understand ; that he heard some one on the edge of the sidewalk say, "Here come the police," and then there was a rush as if to see the police as they were coming up ; that a man came from the wagon to the parties on the south side of the alley and "lit a match and touched it off, something or other ; the fuse commenced to fizzle and he gave a couple of steps forward and tossed it over into the street, . . . the man that lit the match came on this side of him and the two or three of them stood together, and he turned around with it in his hand," etc. The witness stated, that he did not know the name of the man, who threw the bomb, but knew him by sight, as he had seen him several times at meetings at different places in the city. When shown a photograph of Schnaubelt, he said : "I say that is the man that threw the bomb out of the alley." When asked who the man was that came from the wagon towards the group referred to and lighted the match, he pointed to the defendant Spies and said : "That is the man right there." The defence have proven that a match was lighted in the alley at this time, but claim that it was struck by a laborer in order to light his pipe.

The defence introduced nine witnesses living in Chicago for the purpose of impeaching Gilmer. The prosecution introduced eight witnesses from Iowa, where Gilmer lived from 1870 to 1879, and ten witnesses from Chicago, where he lived from 1879 to 1886, to sustain his reputation for truth and veracity. Before a witness can say, that he will not believe a man under oath, he must first swear that he knows that man's reputation for truth and veracity among his neighbors, and that such reputation is bad. The unwillingness to believe under oath must follow from and be based upon two facts : first, the fact, that the witness knows the reputation for truth

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and veracity among the man's neighbors, second, the fact, that such reputation is bad. As the reputation must be bad, before it can be known to be bad, the most material fact to be proved is that such reputation is bad. What a man's reputation is, is a fact to be proved just as any other fact. Where, as here, eighteen witnesses of standing and credibility swear that a man's reputation is good, while nine of equal standing and credibility swear that it is bad, the jury must determine for themselves whether they will believe the eighteen men or the nine men.

Other testimony introduced to discredit Gilmer was intended to establish, *first*, that the bomb was not thrown from the point from which Gilmer said it was thrown; *second*, that Spies was just getting off the wagon, when the explosion occurred, and, therefore, could not have been in the alley lighting a match.

A witness by the name of Bennett swore that he saw the bomb thrown and that the man, who threw it, stood right in front of him, and threw the bomb towards the north-west. Desplaines street between the sidewalks is forty-eight feet six inches wide. The bomb fell "on the west side of Desplaines street slightly north from the south line of the alley" extended. The testimony of Bennett does not cast much light upon the subject, either as to the person who threw the bomb, or as to the point, from which it was thrown. When shown the photograph of Schnaubelt and asked if that was the man who threw the bomb, he says: "I guess not. I never could recognize anybody." He says, that the man, who threw the bomb, had his back turned towards him, and that he could not describe him and would not know him, if he saw him. As to the place where he stood when the bomb was thrown, he placed it at one time ten or fifteen feet south of the alley, at another thirty-eight feet south of the alley, at another forty-five feet south of the alley.

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The testimony of the witnesses differs very greatly as to the point with reference to the alley from which the bomb ascended into the air before it fell. One witness says it came from a point north of the alley, another that it came from a point five or six feet south of the corner of the alley, others fix the point at various distances south of the alley varying from five to forty-five feet. Witnesses for the defence, identified mostly with the International organization and from whose midst the shots fired at the police must have come, place the point, from which the bomb was thrown, at the greatest distances south of the point where Gilmer fixes it.

Heineman, the reporter, a witness whose testimony is favorably quoted by both sides, says that he was forty-five feet south of the alley on the east sidewalk of Desplaines street when the bomb exploded, and that he saw the bomb, or the burning fuse, rise out of the crowd from "very nearly the south-east corner of the alley" and "fall among the police." This is just about the place, from which Gilmer says that it ascended.

When the police halted and the captain gave the order to disperse, they were very near the south end of the wagon. The main body was on a line with the mouth of the alley which was eleven feet wide. Bonfield says, "the front rank of the first division was near up to the north line of the alley." All the police faced towards the north and were standing in regular fixed lines. Several of the officers describe the course of the bomb through the air, as seen by them from their positions in the ranks. It could not have been seen by them in the manner indicated in their testimony, if it had started from a point as far south as that sworn to by Bennett and some of the other witnesses for the defence.

The defence introduced a number of witnesses, more or less identified with the defendants in their conspiracy against the police and who stood around the wagon during the evening, for the purpose of showing that Spies did not go into

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the alley just before the explosion. The testimony is negative in its character. It may have been true that Spies did go into the mouth of the alley as Gilmer says, and yet it may be true, that most of these witnesses, whose attention was naturally directed towards the approaching columns of the police, may not have seen him enter the alley. The defendant Spies swears, that, when the order to disperse was given, he was still on the wagon, and that, when he dismounted, the bomb exploded just as he touched the sidewalk. The evidence of other witnesses for the defence tends to confirm this statement. He says, that, after the explosion, he was carried northward by the pushing crowd and went into Zepf's Hall, and that he did not go into the alley nor in the direction of the alley. But Bonfield swears, that, after his arrest, Spies claimed to have gone, after the explosion, eastward through Crane's alley and then southward therefrom to Randolph street. Henry Spies inquired for his brother at Zepf's Hall just after the explosion but did not find him there.

To further contradict Gilmer, a witness was examined for the purpose of showing that Schnaubelt left the Haymarket before the bomb was exploded. This witness was August Krueger, the orderly-sergeant and corresponding secretary of the second company of the Lehr und Wehr Verein. He was present at the Monday night meeting of the armed sections, at which Schnaubelt was also present.

Krueger states that he saw the notice of the Haymarket meeting in the "Arbeiter Zeitung" and went there about nine o'clock and remained until ten o'clock; that about ten o'clock he was standing on the west side of Desplaines street about thirty or forty feet north of Randolph street, when Schnaubelt came towards him from the north-east; that he had seen Schnaubelt before, but did not know his name; that Schnaubelt proposed to him to go home; that he walked south to Randolph street with Schnaubelt, then eastward to Clinton street, when Schnaubelt proceeded on eastward on

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Randolph street, while he went north on Clinton street, thence by way of Milwaukee avenue to Engel's house.

If this were all true, Schnaubelt may have returned and entered Crane's alley through its opening into Randolph street. Krueger stated, after he was arrested on May 6, that he was not at the Haymarket at all on the evening of May 4, and, upon his cross-examination in this case, he admits that he so stated.

There is a mass of testimony in the record in reference to the statements made by Thompson and Gilmer. Some of this testimony sustains those statements and some of it discredits them. Any further review of it than that, which has already been made, will be impossible in this opinion. It is sufficient to say that it is very conflicting. It was the province of the jury to pass upon it. They had the right to consider it in connection with all the other facts and circumstances in the case.

It is not necessary for us to pass any opinion upon it, as we think there is evidence enough in the record to sustain the finding of the jury independently of the testimony given by Thompson and Gilmer.

Fielden:

On Monday evening the defendant Fielden was making a speech to some wagon-makers on one of the upper floors of the building No. 54 West Lake street, while the armed sections were concocting their conspiracy in the basement of that building. The proof does not show, however, that he was present at the meeting in the basement, or took part in the original formation of the Monday night conspiracy.

"A conspiracy may be described, in general terms, as a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose; or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means." (3 Greenleaf on Evidence, sec.

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89; *Heaps v. Dunham*, 95 Ill. 583.) It is not necessary, however, that the accused should have been an original contriver of the mischief, "for he may become a partaker in it by joining the others while it is being executed." (2 Bishop on Crim. Law, 190.) If he concurs, no proof of *agreement to concur* is necessary. . . . As soon as the union of wills for the unlawful purpose is perfected, the offence of conspiracy is complete. This joint assent of minds, like all other parts of a criminal case, may be established as an inference of the jury from other facts proved; in other words, by circumstantial evidence. 2 Bishop on Crim. Law, 190, and note 7.

Are there such facts and circumstances proven in this case, as would warrant a jury in finding that the defendant Fielden became a partaker in the conspiracy planned on Monday night by joining those who were engaged in its execution on Tuesday night?

He says that he had an engagement to make a speech Tuesday night on West Twelfth street, but that he saw in an English evening paper a call to the members of the American group to meet at No. 107 Fifth avenue on important business; that, as he was the treasurer of that group and had its funds in his hands, he cancelled his engagement and went to the meeting so called, arriving at ten minutes before eight. It was held in the office of the "Arbeiter Zeitung" newspaper and has already been referred to. Between eight and nine o'clock he left the "Arbeiter Zeitung" building and went over, in company with Parsons and other members of the "International Rifles," to the Haymarket. After the crowd there had been addressed by Spies and Parsons, the defendant Fielden made a speech from the wagon, some of which was as follows:

"There are premonitions of danger. All knew. The press say the anarchists will sneak away. We are not going to. If we continue to be robbed, it will not be long before we will be murdered. There is no security for the working classes

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under the present social system. A few individuals control the means of living, and holding the workingmen in a vise. Everybody does not know. Those who know it are tired of it, and know the others will get tired of it, too. They are determined to end it, and will end it, and there is no power in the land that will prevent them. Congressman Foran said: 'The laborer can get nothing from legislation.' He also said that the laborers can get some relief from their present condition when the rich man knew it was unsafe for him to live in a community where there were dissatisfied workingmen, for they would solve the labor problem. *I don't know whether you are democrats or republicans, but whichever you are, you worship at the shrine of rebels.* John Brown, Jefferson, Washington, Patrick Henry and Hopkins said to the people: 'The law is your enemy. We are rebels against it. The law is only framed for those that are your enslavers.' (A voice: 'That is true.') Men in their blind rage attacked McCormick's factory, and were shot down by the law in cold blood, in the city of Chicago, in the protection of property. Those men were going to do some damage to a certain person's interest, who was a large property owner, therefore the law came to his defence; and when McCormick undertook to do some injury to the interest of those who had no property, the law also came to his defence, and not to the workingman's defence, when he, Mr. McCormick, attacked him and his living. (Cries of 'No.') There is the difference. The law makes no distinctions. A million men own all the property in this country. The law has no use for the other fifty-four million. (A voice: 'Right enough.') You have nothing more to do with the law except to lay hands on it, and throttle it until it makes its last kick. It turns your brothers out on the wayside, and has degraded them until they have lost the last vestige of humanity, and they are mere things and animals. Keep your eye upon it. Throttle it. Kill it. Stab it. Do everything you can to wound it—to impede its progress. Remember, before trusting them to do anything for your-

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self, prepare to do it for yourself. Don't turn over your business to anybody else. No man deserves anything unless he is man enough to make an effort to lift himself from oppression. Is it not a fact that we have no choice as to our existence, for we can't dictate what our labor is worth? He that has to obey the will of any, is a slave. Can we do anything except by the strong arm of resistance? Socialists are not going to declare war; but I tell you war has been declared upon us, and I ask you to get hold of anything that will help to resist the onslaught of the enemy and the usurper. The skirmish lines have met. People have been shot. Men, women and children have not been spared by the capitalists and minions of private capital. It had no mercy,—so ought you. You are called upon to defend yourselves, your lives, your future. What matters it whether you kill yourselves with work to get a little relief, or die on the battle-field, resisting the enemy? What is the difference? Any animal, however loathsome, will resist when stepped upon. Are men less than snails or worms? I have some resistance in me. I know that you have, too. You have been robbed, and you will be starved into a worse condition."

At this point the policemen appeared and ordered the meeting to disperse, as has already been stated. Witnesses for the State swear, that, when the police were approaching the alley, either Fielden, or some one with him on or near the wagon, used the following language: "Here come the blood-hounds; do your duty, men, and I'll do mine." Witnesses for the defence swear, that no such words were spoken. Whether one set of witnesses or the other told the truth upon this subject was a matter for the jury to decide.

There is evidence of a very distinct and positive character that Fielden shot at the police:

Lieutenant Martin Quinn says: "There was a shot fired from the wagon by the man that was speaking at that time. . . . It is Mr. Fielden here. . . . He made the remark, 'We are peaceable' just as he was going down off of

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the wagon on to the sidewalk . . . and just as he was going down he fired right where the inspector was and Captain Ward and Lieutenant Steele," etc.

Officer Krueger says: "He (Fielden) stood at the south end of the wagon; . . . he stepped down from the wagon and passed right to my right behind the wagon, and in about a moment the bomb fell behind me. *Then I saw a pistol in his hand and it exploded twice. I am certain of two shots being fired by that gentleman (Fielden.)* I stood within about six or eight feet of the wagon, on the street side of it. He (Fielden) passed right past me; I could almost have touched him with my hand, and he went right behind the wagon and stepped up on the sidewalk when the bomb exploded. *Then I saw him have a pistol in his hand and he fired twice to my recollection;* . . . he took cover behind the wagon; he covered himself with the wagon between the police and him; I then returned his fire and at the same instant *I received a bullet in my knee-cap;* he fired directly at the column of the police and he fired two shots from there; he stooped down behind the wagon."

L. C. Baumann, a policeman of Lieutenant Steele's company, says: "I was standing north of that alley there, I should judge three or four feet from the wagon. . . . *I saw Mr. Fielden, that he was standing on the hind wheel, behind the hind wheel of the wagon, and had a revolver in his hand and fired off a shot;* he was standing on the sidewalk right behind the hind wheel; he shot from east to west; *that was after the explosion of the bomb, I should say about half a minute.*"

Officer Hanley says: "At the time the bomb exploded I was about four or five feet from the wagon; I was facing north; I noticed the man that was the last speaker; immediately after the bomb exploded I turned my face from (to) where the explosion was, and I looked for the wagon again, and I noticed that man right over there (referring to defendant Fielden) *by the wheel of the wagon, with a revolver, right behind,*

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string. I saw one shot go, then I thought it was time to draw my revolver, and, just as I got my revolver out, they rushed for the alley, that was a little south of the wagon. Q. Who rushed into the alley? A. Well, him (Fielden) and about, I really should judge, *about twenty more; they kept firing about fifteen or twenty shots after they started to run in the alley.*"

Officer Spierling says: "I was facing north when the bomb exploded; I was about ten or twelve feet from the wagon at that time. *I saw Mr. Fielden get off of the wagon and fire one shot; he was standing behind the wagon on the sidewalk.*"

John Wessler, a policeman in Lieutenant Bowler's company, testified: "The wagon stood next to the curb lengthwise—and at the middle of the south end of the wagon, *Mr. Fielden stood there and I noticed before I got there a man who would not stand up, and he would shoot into the police and get down behind the wheel, . . . and I went up and saw that Mr. Fielden was there and he got up a second time and shot into the police.*"

Fielden swears that he not only fired no shots on Tuesday evening, but that *he had, no revolver and never carried one in his life.* It was for the jury to determine whether he told the truth or not. They had a right to consider that he was on trial for murder, and that for more than a year prior to the Haymarket meeting he had not only been urging others to arm themselves, but himself belonged to the *armed* section of the American group, otherwise known as the International Rifles.

Besides Fielden, six witnesses were produced by the defence, who swore that they did not see any shots fired by Fielden. If there was a bias against the defendant Fielden on the part of the policemen testifying for the State, there was just as much of a bias in his favor on the part of those testifying for the defence. Here is a conflict of testimony. Six men swear that they saw pistol shots fired by the defendant Fielden; six other men swear that they did not see such shots fired. The jury saw the witnesses and heard them testify and marked

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their manner and bearing on the stand. It was their special province to determine whether the witnesses for the accused or for the People told the truth.

It is true, that Degan was killed by the bomb that was thrown, and not by the shots that were fired. But the attack at the Haymarket was a joint attack made by a number of persons with two different kinds of weapons in pursuance of a previously arranged conspiracy. When Fielden lent himself to the execution of that conspiracy by participating in the joint attack, he was just as guilty of the murder of Degan by reason of firing his pistol as though he had thrown the bomb. If the man, who threw the bomb, and the twenty men, whom officer Hanley saw running into the alley, had stood up together and the one had thrown his bomb and the others had fired their shots all at the same time into the ranks of the police and one of the policemen had at once fallen dead, would not each of the twenty men have been as responsible as the bomb-thrower for the death of the man killed, whether such death was caused by the bomb or by the shots? All had the murderous intent. All were using deadly weapons in pursuance of a common design to destroy life. The conduct of Fielden at the Haymarket, considered in connection with his acts prior thereto and with all the other facts, as herein set forth, certainly warranted the jury in finding that he was one of the conspirators.

Parsons:

What are the facts in regard to the connection of the defendant Parsons with the Haymarket meeting?

The call to the American group to meet at half-past seven o'clock at the "Arbeiter Zeitung" office on Tuesday evening was published by the defendant Parsons. The notice, which has already been referred to, was inserted by him in the "Evening News," and the original manuscript, from which it was printed, was in his handwriting. He was seen by several

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witnesses at the Haymarket on the corner of Randolph and Halsted streets before eight o'clock and before he appeared at the gathering of the group he had called together at 107 Fifth avenue. From the latter place he went in company with Fielden, Snyder and others to the speakers' wagon on Desplaines street and made a speech to the crowd there gathered. The witness Allen, who heard his speech, says:

"About the only thing that I could quote exact was that at one time he said: 'What good are these strikes going to do? Do you think that anything will be accomplished by them? Do you think the workingmen are going to gain their point? No, no, they will not. The result of them will be that you will have to go back to work for less money than you are getting.' That is his language, in effect. . . . At one time he mentioned the name of Jay Gould. There were cries from the crowd, 'Hang Jay Gould—throw him into the Lake,' and so on. He said: 'No, no; that would not do any good. If you would hang Jay Gould now, there would be another, and perhaps a hundred, up to-morrow. It don't do any good to hang one man. You have to kill them all, or get rid of them all.' Then he went on to say that it was not the individual always, but the system. That the government should be destroyed. It was the wrong government, and these people who supported it had to be destroyed *en masse*. The temper of the crowd was extremely turbulent, especially after that speech he made about the workingmen not gaining anything by the strike. . . . The crowd seemed to me to be thoroughly in sympathy with the speaker, and applauded almost every utterance."

Tuttle says: "The crowd that was enthusiastic was near the wagon or around it, and some were on the north side of the wagon. The same parties who had spoken when he referred to Gould,—I think the same,—one of them any way, because I had my eye on him for two or three minutes,—two minutes, I should say. I think I could describe the man, and would

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know if I saw him. He stuck up his hand like that (illustrating), with a revolver in it, and said, 'We will shoot the devils,' or some such expression. And I saw two others sticking up their hands near to him, who made similar expressions, and had what I took to be, at that time, revolvers. But this one man I speak of, I took particular notice of him, and remember his appearance, and saw his revolver very plainly in his right hand,—and he grasped it about the center of the weapon, and stuck it up in front of the speaker."

Cosgrove says: That Parsons talked of the police and capitalists, and militia and Pinkertons. He said he was down in the Hocking Valley region, and said they were only getting twenty-four cents a day, and that was less than Chinamen, and he said, "My friends, you will be worse than Chinamen, if you don't arm yourselves," and he said they would be held responsible for the blood that would flow in the near future.

McKeough testifies: "Parsons, among other things, said: 'I am a tenant and I pay rent to a landlord. . . . The landlord pays taxes, the taxes pay the sheriff, the police, the Pinkerton knights and the militia that are on duty out at the barracks, who are ready to shoot you down when you are looking for your rights. I am a socialist from the top of my head to the soles of my feet and I will express my sentiments if I die before morning.' He said that very strongly and made a great commotion. That seemed to kind of catch the crowd in the neighborhood of the wagon and they let out a great cheer. . . . I went to the outer edge of the crowd. . . . The next remark I heard Mr. Parsons say, taking off his hat in one hand, said he: 'To arms, to arms, to arms,' three times distinctly."

English says: "Spies, I think, spoke fifteen or twenty minutes. . . . Well, now here is an abstract of Parsons, and I can't give the exact language when he first started off. It was about the workingmen, that the remedy for their wrongs was in socialism. He said, without them they would soon

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become Chinamen. He said: 'It is time to raise a note of warning. There is nothing in the eight-hour movement to excite the capitalist. Don't you know that the military are under arms, and a Gatling gun is ready to mow you down? Was this Germany, or Russia, or Spain?' (A voice, 'It looks like it.') 'Whenever you make a demand for eight hours pay, an increase of pay, the militia, and the deputy sheriffs, and the Pinkerton men are called out, and you are shot and clubbed and murdered in the streets. I am not here for the purpose of inciting anybody, but to speak out to tell the facts as they exist, even though it shall cost me my life before morning.' Then he went on to tell about the Cincinnati demonstration and about the rifle-guard being needed. There is another part of it here. 'It behooves you, as you love your wife and children, if you don't want to see them perish with hunger, killed or cut down like dogs on the street, Americans, in the interest of your liberty and your independence, to arm, arm yourselves.'"

Simonson, a witness for the defence, says of the speech, made by Parsons: "I remember in his speech he said: '*To arms, to arms, to arms,*' but in what connection I can not remember."

There is no dispute about the fact that Spies spoke first, Parsons next and Fielden last. It is claimed by the defence, that, just before Fielden closed his speech, Parsons left the speakers' wagon, or a wagon standing just north of it, on account of an appearance of rain, and went to Zepf's Hall, and that he was in the saloon at Zepf's Hall when the bomb exploded. Allen, one of the newspaper reporters, says: "When the bomb was thrown I was in the saloon of Zepf's Hall, standing about the middle of the room at the time. I did not see any of the defendants there. . . . I am almost certain Parsons was not at Zepf's Hall. . . . There was a constant passing to and fro from the furniture-workers' meeting up-stairs to the meeting over at the Hay-

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market. I was with Mr. Malkoff at Zepf's Hall." Parsons says, that, "in a moment or two" after the explosion, two or three men rushed breathlessly in at the door of the saloon and that he "remained there possibly twenty minutes or so." Knox, another newspaper reporter, swears, that he had a conversation with Spies on the night of May 5, and Spies then said that when the bomb exploded he ran to Zepf's Hall and there found a certain party "*waiting for*" Parsons.

The statement of Parsons, that he was in the saloon at Zepf's Hall when the bomb exploded, is sustained by the testimony of Ingram, of Malkoff, a Russian, who on May 4, 1886, was a reporter for the "Arbeiter Zeitung" and a correspondent of a paper in Moscow, Russia, and had roomed with Rau and lived with Schwab; of Brown, a member of the American group, who had attended the meeting at 107 Fifth avenue on Tuesday night and had been arrested by reason of his connection with the Haymarket meeting; and of Wandray, who had belonged to the North-west Side group for three years before December, 1885.

Two circumstances are to be noted: *First*, it can hardly be said that Parsons was absent from the Haymarket meeting, when he went into Zepf's Hall. It has already been stated, that the latter place was only a few steps north of the speakers' wagon and in sight from it. Parsons himself says that, before he left the wagon, he "saw the lights through the windows of the hall." From the window of the saloon he was watching the proceedings around the wagon, when the explosion occurred. He says: "All at once looking directly at the meeting I saw an illumination." *Second*, he did not start to Zepf's Hall until five or ten minutes before the police came up to the wagon. When he left the wagon for the saloon, Fielden had just uttered the words about stabbing and throttling the law, which had so excited the crowd as to induce McKeough to go to the Desplaines street station and report to the police inspector what had been said.

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We do not think, that the defendant Parsons can escape his share of the responsibility for the explosion at the Hay-market because he stepped into a neighboring saloon and looked at the explosion through the window. While he was speaking, men stood around him with arms in their hands. Many of these men were members of the armed sections of the International groups. Among them were men, who belonged to the "International Rifles," an armed organization, in which he himself was an officer, and with which he had been drilling in preparation for the events then transpiring. To the men then listening to him he had addressed the incendiary appeals that had been appearing in the "Alarm" for two years. He had said to them: "One dynamite bomb properly placed will destroy a regiment of soldiers, a weapon easily made, and carried with perfect safety in the pockets of one's clothing." He had said to them on Saturday, April 24, 1886, just ten days before May 4, 1886, in the last issue of the "Alarm" that had appeared before May 4: "Workingmen to arms. War to the palace, peace to the cottage and death to luxurious idleness. The wage system is the only cause of the world's misery. One pound of dynamite is better than a bushel of bullets. Make your demand for eight hours with weapons in your hands to meet the capitalistic blood-hounds, police and militia in proper manner;" and, at the close of another article in the same issue, he had also said: "*The social war has come and whoever is not with us is against us.*" To many of these same men, there gathered around the wagon from which he was speaking, after denouncing the police and militia as ready to shoot them down, he took off his hat and cried out: "To arms! To arms! To arms!" Within less than an hour after the delivery of this appeal and on the spot where it was made, persons in the crowd, to which it was addressed, attacked the police with bomb and revolver, and Degan was killed. What is the law applicable to the state of facts here recited?

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"If one purposely excites another to commit an offence, as, if he harangues people, inflaming them to a riot, and the offence is accordingly committed, he is guilty, though he personally takes no part in it." 1 Bishop on Crim. Law, 640.

In *Regina v. Sharpe*, 3 Cox's C. C. 288, Chief Justice WILDE, in charging the jury, said:

"If persons are assembled together, to the number of three or more, and speeches are made to those persons, to excite and inflame them, with a view to incite them to acts of violence, and if that same meeting is so connected in point of circumstances, with a subsequent riot, that you can not reasonably sever the latter from the incitement that was used, it appears to me that those who incited are guilty of the riot, although they are not actually present when it occurs. *I think it is not the hand that strikes the blow, or that throws the stone (bomb,) that is alone guilty under such circumstances; but that he who inflames people's minds, and induces them by violent means to accomplish an illegal object, is himself a rioter,* though he take no part in the riot. It will be a question for the *jury*, whether the riot that took place was so connected with the inflammatory language used by the defendant that they can not reasonably be separated by time or by other circumstances."

The jury were warranted in believing from the evidence that the defendant Parsons was associated with the man, who threw the bomb, and the men, who fired the shots at the Haymarket, in a conspiracy to bring about a social revolution in Chicago by force on or about May 1, 1886, or, in other words, to destroy the police and militia on or about that date with bombs and revolvers or rifles. It is well settled that, when the fact of a conspiracy is once established, any act of one of the conspirators in the prosecution of the enterprise is considered the act of all. *Nudd v. Burrows*, 91 U. S. 426; 1 Wharton's Am. Crim. Law, (6th ed.) sec. 702; 3 Greenleaf on Evidence, sec. 94.

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It makes no difference, that Parsons may not have been present in the basement of Greif's Hall when the Monday night conspiracy was planned. He belonged to the armed sections, whose representatives entered into that conspiracy and was one of the absent members, who were to be informed of its provisions. One of those provisions was the holding of a meeting at the Haymarket. When he went to that meeting in obedience to a summons from Rau and there made an incendiary speech, he joined the others in their execution of the conspiracy and thereby became a party to it. "Individuals who, though not specifically parties to the killing, are present and consenting to the assemblage, by whom it is perpetrated, are principals when the killing is in pursuance of the common design." Wharton on Homicide, (2d ed.) sec. 201; Wharton's Am. Law of Homicide, 345, 346, etc.; *Regina v. Jackson*, 7 Cox's C. C. 357; *Commonwealth v. Daley*, 4 Pa. L. J. 150.

The plan, adopted on Monday night, was merely a specific mode of carrying out the more general conspiracy, to which Parsons and those present on Monday night were all parties. The adoption of the Monday night plot was the *act* of those who were co-conspirators with Parsons. It was therefore his act. He had advised the use of bombs and arms against the police on or about May 1. The men, who met Monday night, merely indicated more specifically the time when and places where and mode in which such bombs and arms should be used, so as to be most effective. "A man may be guilty of a wrong which he did not specifically intend, if it came naturally or even accidentally from some other specific, or a general, evil purpose. *When, therefore, persons combine to do an unlawful thing*, if the act of one proceeding according to the common plan *terminates in a criminal result, though not the particular result meant, all are liable.*" 1 Bishop on Crim. Law, 636, and cases cited.

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"There might be no special malice against the party slain nor deliberate intention to hurt him; but if the fact was committed in prosecution of the original purpose, which was unlawful, the whole party will be involved in the guilt of him who gave the blow." (Foster, p. 351, sec. 6.) "Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged." *State v. McCahill*, 72 Iowa, 111.

He, who enters into a combination or conspiracy to do such an unlawful act as will probably result in the unlawful taking of human life, must be presumed to have understood the consequences, which might reasonably be expected to flow from carrying it into effect, and also to have assented to the doing of whatever would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life. 1 Wharton on Crim. Law, (9th ed.) sec. 225 a; *Brennan et al. v. The People*, 15 Ill. 511; *Hanna v. The People*, 86 id. 243; *Lamb v. The People*, 96 id. 74.

Neebe:

The defendant Neebe, as has already been stated, was a member of the North Side group, which had resolved "not to meet the enemy unarmed on May 1, 1886." He was one of the stockholders of the "Arbeiter Zeitung" and, next to Spies and Schwab, the most active man in its management. He was looked for and found at the "Arbeiter Zeitung" office in consultation with Spies and Schwab during the week prior to May 4. The testimony of Gruenhut shows that Neebe was active in organizing and preparing for the movements then going on. He was found in possession of the "Arbeiter Zeitung" building after the arrest of Spies and Schwab and announced himself as the person, who had charge of the

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office. He stated to the officers that a package of dynamite, which they found in a closet on one of the floors of the building, was something for "cleaning type." There were found at his house on May 7 a red flag, a sword, a breech-loading gun and a 38-caliber Colt's revolver, five chambers of which had been fired; one chamber was loaded with a cartridge and one had a shell in it. He is shown to have presided at meetings where the use of arms and dynamite against the police was advocated. On Monday night May 3, 1886, he was seen distributing the "Revenge" circulars. He took a package of them into a saloon at the corner of Franklin and Division streets on that night between nine and ten o'clock and placed some on the counter and some on the tables, while seven or eight persons were present. He stated there, that the circulars had just then been printed. He exhibited anger towards the police, and said, in reference to the riot of that afternoon: "It is a shame that the police act that way, but may be the time comes that it goes the other way—that they get the chance, too."

When a man, as prominently connected as Neebe was with the International organization and its organ and leaders, was proven to have been engaged late on the night before the Haymarket murder in distributing an inflammatory circular calling upon ignorant workingmen to arm themselves and avenge the act of the police in quelling a riotous disturbance, we can not say that the jury were not justified in holding him responsible, along with his confederates, for the murder on Tuesday night of one of the very policemen, whose death he was urging and advocating on Monday night. We do not think that the trial court erred in refusing the instructions asked on his behalf.

Various errors are assigned upon the record. These errors relate to the evidence introduced, the instructions given and the impaneling of the jury.

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It is claimed that the trial court admitted improper testimony. The newspaper articles and the speeches, already referred to, are complained of as having been improperly received in evidence.

We think that there was no error in admitting them for the following reasons:

First—The International Association in Chicago, as above described, was an illegal organization, engaged in making bombs and drilling with arms for the unlawful purpose of attacking the police if the latter should assume to do their duty in the protection of the public peace. Its members were conspirators, and, by their act of conspiring together, they “jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design.” (3 Greenleaf on Evidence, sec. 94.) The papers, which published the articles in question, were the organs of this conspiracy. The men, who made the speeches in question, were its spokesmen and mouth-pieces. Hence the utterances of these papers and speakers were competent evidence, as showing the purposes and intentions of the conspiracy, which they represented.

Second—Spies, Schwab, Parsons and Engel were responsible for the articles written and published by them as above shown. Spies, Schwab, Fielden, Parsons and Engel were responsible for the speeches made by them respectively. As against *these* defendants, the articles and speeches in question were properly introduced in evidence, not because they gave *general* advice to commit murder, but because they advised and encouraged a particular class in Chicago, to-wit: the members of the International groups and such other workingmen as could be persuaded to join them, “to arm themselves with guns, revolvers and dynamite,” and kill another particular class in Chicago, to-wit: the police at a particular time to-wit: about May 1, 1886. There is evidence in the record tending to show, that the death of Degan occurred

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during the prosecution of a conspiracy planned by members of the International groups, who read these articles and heard these speeches. How far the formation and execution of this conspiracy may have been aided and encouraged by the printed and spoken utterances of the particular defendants here named was a proper matter for the jury to consider in the light of all the other circumstances developed by the testimony in the case.

Third—The evidence objected to was properly introduced against all the defendants. Where the conspiracy is once established, every act and declaration of each member in furtherance of the common design are, in contemplation of law, the act and declaration of all the members, and are therefore original evidence against each of them. "It makes no difference at what time any one entered into the conspiracy." (1 Greenleaf on Evidence, sec. 111.) All the defendants in this case are proven to have belonged to the illegal organization above specified. Hence they were all co-conspirators. The speeches and newspaper articles here under consideration were in furtherance of the common design. Being the acts and declarations of some of the conspirators they were the acts and declarations of all of them.

It is not necessary to hold, that the conviction of the defendants in this case is to stand merely because they made speeches and published articles advising the murder of the police. Such conviction is sustained because there is evidence in the record, from which the jury were warranted in believing that the defendants advised, encouraged, aided and abetted the perpetration of the crime, committed at the Haymarket. When they combined or conspired together, with a view of bringing about that crime, and became united in a common plan for its commission, then the acts and declarations of any one of them, which had the effect of advising, encouraging, aiding and abetting its perpetration, were the acts and declarations of all.

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We do not agree with the position of counsel, that the general conspiracy hereinbefore described and the plot of Monday night, May 3, 1886, were two separate conspiracies. The latter was merely the outgrowth and culmination of the former. The latter merely designated the particular mode in which the objects of the former were to be effected. It was competent to show the acts and declarations of the parties to the general conspiracy, which preceded and led up to the formation of the special plot of May 3 with a view of understanding the latter. The defendants were engaged in a series of efforts to increase the International groups by accessions from the workingmen, and to educate and discipline those groups in the making of bombs and in the use of firearms, so as to prepare them for a conflict with the police when the eight-hour excitement should reach its height. Among these efforts were the speeches made and the publications issued, as hereinbefore stated. The Monday night conspiracy was the product of these efforts, and could only be understood by showing their nature and character. These views are sustained by the following authorities: *Campbell v. Commonwealth*, 84 Pa. St. 187; *State v. McCahill*, 72 Iowa, 111; *Card v. State*, 109 Ind. 415; *Rex v. Hammond*, 2 Esp. 719; *The People v. Mather*, 4 Wend. 229; 2 Bishop on Crim. Proc. sec. 227; *United States v. Cole*, 5 McLean, 601; *Queen v. Most*, L. R. 7 Q. B. D. 244.

The admission in evidence of Johann Most's book on the Science of Revolutionary Warfare is complained of as error. The work, which is called a book, is really nothing more than a treatise in pamphlet form upon the most improved methods of making bombs and preparing dynamite and other explosives. It is thus characterized by the counsel for plaintiffs in error in their brief: "Here was a voluminous, incendiary, outrageous publication, going into the detail of the manufacture of explosives and arms and the manner of preparing them, filled with vile suggestions as to how to apply the results of

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modern science to the work of destruction of the capitalistic system, abounding in advice to persons who, as members of the so-called revolutionary forces, might propose to engage in the use of these weapons and explosives."

The circulation of this treatise was an act of the illegal organization, to which all the defendants belonged, and was one of the methods by which that organization instructed and advised its members to get ready for the murder of the police during the eight-hour excitement. Its distribution among the members of the International groups at their picnics and meetings, through the agents of the International Association, is proven beyond controversy. The newspaper organs commended it and quoted from it and advertised it without charge. Lingg and Fischer read it and acted upon the suggestions contained in it. When the leaders of the organization thus made use of this treatise, they adopted it as a manual of tactics, and it became a book of their written advice and instructions to their followers. It was competent testimony as showing the purposes and objects which they had in view, and the methods, by which they proposed to accomplish those objects. When the newspaper organs commended its study to their readers, they made its suggestions a part of their own advice to those readers. The efforts of the defendants who controlled these organs, to put this pamphlet into the hands of the members of the International groups, were acts and declarations in furtherance of the conspiracy, and were binding upon the other defendants.

It is also assigned as error, that the trial court admitted in evidence a letter, written to the defendant Spies in 1884 by Johann Most, the author of the treatise above referred to. The letter is set out in the statement, which prefaces this opinion.

The defendant Spies took the stand as a witness for the defence. Upon his cross-examination the prosecution produced the letter in question, examined him in reference to it and then offered it in evidence, and it was admitted.

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The main objection is, that, after the arrest of Spies, certain effects of his, including this letter, were seized by the police in the "Arbeiter Zeitung" office without a search warrant or other legal process; that such seizure was in violation of the United States and Illinois constitutions, and that the admission of the letter "was," in the language of counsel for plaintiffs in error, "improper as being in effect a compelling of the plaintiffs in error to give testimony against themselves contrary to the provision of the fifth amendment of the Federal constitution and to the provision of article 2 of our constitution of 1870." In other words, the introduction of the letter is objected to in this court, as having been in contravention of the principles laid down by the Supreme Court of the United States in *Boyd v. United States*, 116 U. S. 616. In that case, an act of Congress, authorizing the Federal courts to require parties charged with violations of the revenue laws to produce their books, invoices and papers for inspection and for use in evidence against themselves, was declared to be unconstitutional. In the case at bar, the defendants were not required to produce the letter; the State had the letter and produced it. We will not attempt, however, to draw any distinction between this case and the *Boyd case*. We do not think that the record is in such shape as to permit counsel to make the point, urged by them, before this court.

In the first place, it is not clear from the testimony that the letter from Most *was* seized by the police in the manner suggested. Early in the trial two police officers, testifying for the prosecution, stated that on May 5, 1886, they took possession of a number of articles found in the office of the "Arbeiter Zeitung" newspaper, among which were certain letters lying on the desk occupied by Spies, and certain other letters in the drawer of the desk. But it nowhere appears in the record, so far as we can find, that this particular letter from Most to Spies, introduced near the close of the trial, was among the letters so taken from the top of Spies' desk or

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among those so taken from the drawer of it. For aught that appears to the contrary, this letter may not have come to the hands of the State through the alleged illegal seizure complained of, but may have been obtained in some other proper and legitimate manner. We can not infer, that, because certain letters were seized by the police, the Most letter must have been one of them.

On the trial below counsel for the defence took the position that the letter was not found in the possession of Spies. We find the following statement in the record of what occurred, when the trial judge passed upon the offer to introduce the letter: "The Court: . . . Letters which have never been in the possession of the defendant can not be admissible in evidence against him." Mr. Black: '*There is no evidence in this case that the letter was found in his possession.*' The court: 'He says he received it.'" This brings us to the second reason why the point now under consideration can not be made here.

The objection, that the letter was obtained from the defendants by an unlawful seizure, is made for the first time in this court. It was not made on the trial in the court below. Such an objection as this, which is not suggested by the nature of the offered evidence, but depends upon the proof of an outside fact, should have been made on the trial. The defence should have proved that the Most letter was one of the letters illegally seized by the police and should then have moved to exclude it, or opposed its admission, on the ground that it was obtained by such illegal seizure. This was not done, and, therefore, we can not consider the constitutional question supposed to be involved.

The only objections made to the Most letter, which we find in the record, were: First—that it was not proper cross-examination; second—that it had not been answered by Spies.

The defendant Spies on his direct examination had explained his possession of two bombs with iron shells by say-

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ing, that an unknown person, who claimed to be a shoemaker named Schwope and to be on his way from Cleveland to New Zealand, had called at the "Arbeiter Zeitung" office, and, asking Spies if he had seen one of the bombs "*they*" were making, had left the two iron shells, saying "he would not take them along." Spies also testified, that a stranger had called at the office in his absence and left two "czar" bombs on his desk, stating to the book-keeper or office-boy, that he came merely to "inquire whether those were bombs of a good construction, and the man never called for them." He further testified, that he procured the cartridges of dynamite and coils of fuse and detonating caps found in his office for the mere purpose of experimenting, without explaining why he wanted to experiment. He stated that he showed these things, or some of them to the reporters, who swear to having seen them there, merely to give them something sensational to write about in their papers.

The Most letter and the questions about its contents were proper subjects for cross-examination, because they tended to test the sincerity of the claim made by him on his direct examination, that he had no *serious* object in view in keeping the dynamite and other articles, which he had on hand. That letter shows on its face that some communication or message had passed between Spies and Most as to a "letter from the Hocking Valley." It also shows that Most proposed to send twenty or twenty-five pounds of what he calls "*medicine and the genuine article at that*" to one Buchtell and asks Spies for directions how to send it. Taken in connection with other evidence, the letter tended to show that Spies and Most were engaged in the very *serious* business of supplying dynamite to discontented laboring men.

The second objection to the letter was that it was unanswered, and therefore inadmissible on the ground that a letter written to a party by a third person, to which no reply is made, does not show an acquiescence in the facts stated

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in it. As we understand the evidence of the defendant Spies, he admits that this letter is in the handwriting of Most and that he received it from Most and read it. He does not say, that he did not answer it, but that he does not remember whether he answered it or not. We do not think, however, that it can be regarded as an unanswered letter. To all intents and purposes it *was* answered. Spies swears, that he did not himself give the directions asked for by Most in the letter as to shipping the "medicine" or "genuine article," but he also says: "There may have been a letter addressed to my care which I may have sent to him." If he procured a third person to write a letter, giving directions how to ship material to the point indicated, and then enclosed this letter to Most, he, in effect, answered the only portion of Most's letter which required an answer. Moreover, the letter shows in its opening sentences that it was "*invited*" by Spies, (Wharton on Crim. Evidence, (9th ed.) secs. 644, 682) and that it was written in response to some former communication by him.

It is also objected, that the cross-examination of those of the defendants, who took the stand, compelled them to give evidence against themselves. After a careful examination of the testimony of these defendants as set out in the record, we can not see that they were cross-examined upon any subjects not connected with the direct examination. If a defendant offers himself as a witness to disprove a criminal charge, he can not excuse himself from answering on the ground that, by so doing, he may criminate himself. "So far as concerns questions touching the merits, the defendant, by making himself a witness as to the offence, waives his privileges as to all matters connected with the offence. It has been ruled also that, to affect his credibility, he may be asked whether . . . he has been concerned in other crimes, part of the same system." Wharton on Crim. Evidence, sec. 432.

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Objection is also made, that certain articles, which had been struck and torn and otherwise injured through the explosion of the Haymarket bomb and also through the explosion, by way of experiment, of certain bombs made by the defendant Lingg, were improperly introduced before the jury. It was the claim of the International Association and its organs and speakers, constantly put forth by them to the working-men to induce the latter to join the movement against the police and militia, that a dynamite bomb in the hands of one man was equal in destructive power to a regiment of soldiers, armed with rifles. The articles in question were presented in the condition, in which they were left after being exposed to the force of an exploding bomb, for the purpose of showing the power of dynamite as an explosive substance. While this kind of testimony may not have been very material, we can not see that it was to such an extent incompetent as to justify a reversal.

It is also objected, that the trial court allowed bombs, and cans containing dynamite and prepared with contrivances for exploding it, which had been found under the sidewalks and buried in the ground at certain points in the city, to be introduced in evidence. Among these were the bombs hidden by Lingg and Seliger under the sidewalk on Sigel street, and those given by Lingg to Lehmann and buried by Lehmann near Ogden Grove, and those given by Lingg to Thielen and found upon the latter's premises. As specimens of the kind of weapons, which Lingg and his associates were preparing, and as showing the malice and evil heart, which the intended use of such weapons indicated, the introduction of bombs made by him was not improper. The jury had a right to see them and compare their structure with the descriptions of the bomb that killed Degan, with a view of determining whether Lingg was the maker of the latter or not. As to the fact, that some of these bombs and cans, like those shown to the American group during their drill, were found buried near

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Wicker Park—one of the designated meeting places where certain of the armed men were to gather on Tuesday night—this was a circumstance proper to be considered by the jury in determining the nature and character of the conspiracy and its connection with the events of Tuesday night. As to the suggestion, that these things may have been placed, where they were found, by other parties than those connected with the conspiracy herein described, it was for the jury to say, whether, under all the circumstances, any others than the members of that conspiracy had undertaken to make such weapons or knew anything about them.

It is again urged as error, that a witness on the part of the State, for whom Schnaubelt had been working, was allowed to testify that the latter cut off his beard a few days after the night of May 4. In the photograph, that has been referred to, he had a beard. Gilmer swore that Schnaubelt had a beard, when the bomb was thrown. To explain the fact, that he was seen without a beard after the Haymarket meeting, it was shown that he cut off his beard subsequently to the date of that meeting. The statement made by the witness was merely for the purpose of identification. It was not very important, and we can not see that it did any harm.

It is also objected, that some testimony was admitted as to conversations with the defendant Spies, which were merely narrative of what had been or would be done. It is undoubtedly the law, that, after a conspiracy is established, only those declarations of each member, *which are in furtherance of the common design*, can be introduced in evidence against the other members. Declarations, that are merely narrative as to what has been done or will be done, are incompetent and should not be admitted except as against the defendant making them, or in whose presence they are made. The utterances of the defendant Spies, whether in his paper, his speeches or his conversations, were in furtherance of the purposes and objects of the conspiracy, in which he was engaged. If testimony as to

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expressions used by him, that are not of the character here indicated, has crept into the record, it is so inconsiderable that it could not have in any way injured the other defendants. We think this point was sufficiently guarded by the trial judge in his rulings and in his instructions.

A further objection is made as to the *order*, in which the trial court permitted certain portions of the evidence to be introduced. It is claimed, that some of the acts and declarations, proven in the case, were allowed to come in, before proof was made of the conspiracy or of the connection of the defendants with it. This matter is largely discretionary with the trial judge.

The proof of conspiracy, which will authorize the introduction of evidence as to the acts and declarations of the co-conspirators, may be such proof only as is sufficient, in the opinion of the trial judge, to establish *prima facie* the act of conspiracy between the parties, or proper to be laid before the jury, as *tending* to establish such fact. (1 Greenleaf on Evidence, sec. 111.) Sometimes, for the sake of convenience, the acts or declarations of one are admitted in evidence, before sufficient proof is given of the conspiracy; the prosecutor undertaking to furnish such proof in a subsequent stage of the cause. (*Idem.*)

The rule, that the conspiracy must be first established *prima facie*, before the acts and declarations of one conspirator can be received in evidence against another, can not well be enforced "where the proof of the conspiracy depends upon a vast amount of circumstantial evidence, a vast number of isolated and independent facts; and, in any case, where such acts and declarations are introduced in evidence, and the whole of the evidence introduced on the trial, taken together, shows that such a conspiracy actually exists, it will be considered immaterial whether the conspiracy was established before or after the introduction of such acts and declarations."

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(*State v. Winner*, 17 Kan. 298.) The prosecutor may either prove the conspiracy, which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. Roscoe on Crim. Evidence, (7th ed.) 415.

In many important cases evidence has been given of a general conspiracy, before any proof of the particular part which the accused parties have taken. (Idem.) In some peculiar instances, in which it would be difficult to establish the defendant's privity without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of the acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity. Roscoe on Crim. Evidence, 414.

The term "acts," as here used, includes written correspondence and other papers relative to the main design. 1 Greenleaf on Evidence, sec. 111.

Many other objections to different items of testimony are insisted upon by counsel for the defence. We have noticed those, which have seemed to us to be the most important. Any further comment would swell this opinion, already of inordinate length, into still more tiresome proportions. Taking the whole record together we are unable to see, that the lower court committed any such errors, either in the admission or exclusion of evidence, as prejudiced the rights of the defendants.

The second class of errors assigned relates to the giving and refusal of instructions.

First.—The instructions, numbered, 4 and 5½, which were given for the State, are claimed to be erroneous because they did not require the prosecution to establish the identity of the bomb-thrower. The fourth instruction told the jury, that, upon a given state of facts, certain members of the conspiracy mentioned would be guilty of murder, "whether the identity

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of the person throwing the bomb be established or not." Instruction No. 5½ said: "All of such conspirators are guilty of such murder, whether the person, who perpetrated such murder, can be identified or not," etc. The identity here intended had reference to name or personal description. The jury were expressly required by the fourth instruction to find from the evidence, that the person throwing the bomb was, at the time, a member of the conspiracy to unlawfully resist the officers of the law, and that he threw the bomb "in pursuance of such conspiracy and in furtherance of the common object." The theory of the fourth instruction was, that the bomb-thrower was sufficiently identified, if he belonged to the conspiracy and if he threw the bomb to carry out the conspiracy and further its designs, even though his name and personal description were not known. We do not think that this theory was an erroneous one.

Counsel for plaintiffs in error say, that "membership in the supposed conspiracy could not be proved without some evidence of identification." In the first place, some of the counts in the indictment charged, that Rudolph Schnaubelt threw the bomb. Evidence was introduced tending to support these counts. If the jury believed it, they must have found that the crime was committed by a member of the conspiracy, the proof as to Schnaubelt's membership in it being uncontradicted.

In the next place, some of the counts in the indictment charged, that the bomb was thrown by an unknown person. All the proof introduced by the defendants themselves, tending to show that Schnaubelt did not throw the bomb, tended also to prove that an unknown person threw it. If the jury believed the evidence of the defence upon this subject, they had before them other testimony from which they were justified in believing, that the bomb-thrower, though unknown by name or personal description, was a member of the conspiracy and acting in furtherance of its objects. This testimony, in-

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roduced by the State, tended to show, that the bomb-thrower threw a bomb made on Tuesday afternoon by Lingg, the agent of the conspiracy; that he obtained it from a place where only a member of the conspiracy could have obtained it, and at a time when no one but such a member would have sought to obtain it; that he threw it at a meeting appointed by the conspiracy, from the midst of a company of persons belonging to the conspiracy, upon the happening of a contingency provided for by the conspiracy, and as part of an attack planned by the conspiracy. These and other circumstances, already spoken of, were sufficient to establish his membership.

It is a mistake to assume that a defendant can not be charged with advising, encouraging, aiding and abetting an unknown principal in the perpetration of a crime. Suppose that A instructs B to hire some person to kill C. B hires a person, whose name is unknown to A and never becomes known to the State, and that person kills C in pursuance of B's employment. Will it be said that A is not guilty as an accessory before the fact, because the instrument employed by B is unknown by name or personal description? Archbold says that if the principal felon be unknown, the indictment of the accessory may state it accordingly. (Pr. and Pl. vol. 1, p. 67.) It is also held, that if the principal is declared to be unknown in the indictment, and the proof on the trial shows that he is known, there is a fatal variance. (*Rex v. Walker*, 3 Camp. 264; *Rex v. Blick*, 4 C. & P. 377.) But where there are two separate counts one charging the principal to be known, and the other charging him to be unknown, it is sufficient if either is proven. (1 Wharton on Crim. Law, secs. 207, 225, 226, 231; 1 Bishop on Crim. Law, secs. 651, 677; *Regina v. Tyler*, 8 C. & P. 616; *State v. Green*, 26 S. C. 128; *Pilger v. Commonwealth*, 112 Pa. St. 220; *Brennan v. The People*, 15 Ill. 516; *Baxter v. The People*, 3 Gilm. 368; *Ritzman v. The People*, 110 Ill. 362.) The objection, that the instructions on behalf of the State are faulty in not requiring the principal

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in the commission of the crime charged to be identified, is not well taken.

Counsel for plaintiffs in error make the general objection, that the instructions for the State were at variance with the proof introduced by the State. If we understand the meaning of this objection, it is this: that, some of the counts in the indictment having charged the defendants with advising, encouraging, aiding and abetting Schnaubelt in the perpetration of the crime, and the State having introduced testimony to show that Schnaubelt *did* perpetrate the crime, therefore, the instructions should have directed the attention of the jury solely and exclusively to the theory that Schnaubelt was the perpetrator of the crime, and that such instructions were erroneous in having called the attention of the jury to the theory that an unknown person may have been the perpetrator of the crime, notwithstanding the fact that some of the counts charged the defendants with advising, encouraging, aiding and abetting an unknown person in the commission of the crime, and notwithstanding the fact that there was evidence in the record tending to show that the perpetrator of the crime *was* an unknown person. We regard this position as wholly untenable.

Under our statute and the construction given to it by the decisions of this court (*Baxter v. The People*, 3 Gilm. 368, and other cases,) the man, who, "not being present aiding, abetting or assisting, hath advised, encouraged, aided or abetted *the perpetration of the crime*," may be considered as the *principal* in the commission of the crime, may be indicted as principal and may be punished as principal. The indictment need not say anything about his having aided and abetted either a known principal or an unknown principal. It may simply charge him with having committed the murder as principal. Then, if, upon the trial, the proof shows, that he aided, abetted, assisted, advised or encouraged the perpetration of the crime, the charge, that he committed it as *principal*, is estab-

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lished against him. It would make no difference, whether the proof showed, that he so aided and abetted, etc., a *known* principal or an *unknown* principal.

In the case at bar, some of the counts in the indictment charge the defendants with the murder of Degan, as *principals* and not as accessories before the fact. If the jury believed from the evidence that the defendants aided, abetted, advised or encouraged the perpetration of such murder, then they were justified in finding the defendants guilty as principals, as charged in the indictment. The material question for them to consider was not so much whether the man, who threw the bomb, was a *known* person or an *unknown* person, as whether these defendants aided, abetted, advised or encouraged the throwing of the bomb.

The instructions commented upon and not fully quoted in this opinion, are set out in the statement, which precedes it. They will not be here quoted, except so far as may be necessary to understand the comments made upon them.

The portion of the fifth instruction for the State, which is complained of by the plaintiffs in error, is found in the following words: "Although the jury may further believe from the evidence that the time and place for the bringing about of such revolution or the destruction of such authorities had not been definitely agreed upon by the conspirators, but was left to them and the exigencies of time or to the judgment of any of the conspirators."

It is said, that there was no evidence in the record to support the hypothesis contained in the quotation here made. We think there was such evidence. The hypothesis is, that the time and place for bringing about the destruction of the authorities was left to the judgment of some of the conspirators, instead of being definitely agreed upon by all of them. The publication of the word "Ruhe" in the "Arbeiter Zeitung" was to indicate the *time* for the social revolution to begin and for the armed men to gather at their meeting places. Its

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publication was left to the judgment and discretion of a committee appointed by the conspirators. This committee was also to report to the armed men at what *place* the conflict with the police had occurred.

Counsel for plaintiffs in error claim, that instruction No. 5½, given for the State, was erroneous mainly for the following reasons, to-wit: First, "because it assumes that mere *general advice* to the public at large to commit deeds of violence, as contained in speeches or publications, without reference to the particular crime charged and without specifying object, manner, time or place, works responsibility as for murder;" second, because in it "there was the fatal error of an omission of *all reference to the evidence*," or, in other words, that "the jury are not told in it that *if they find from the evidence* so and so, then they can conclude thus and so."

As to the last objection, we think that the defect therein indicated was cured by the instruction, which the trial judge gave to the jury *suo motu*. We have held, that a judge of the circuit court is at liberty to instruct at his discretion if he reduces his instructions to writing, so that the jury can take them with them in considering their verdict. (*Brown v. The People*, 4 Gilm. 439; *Green v. Lewis*, 13 Ill. 642.) In this case, the judge, who presided at the trial in the court below, himself wrote an instruction and read it to the jury, which contained the following words: "What are the facts and what is the truth the jury must determine *from the evidence and from that alone*. If there are any unguarded expressions *in any of the instructions*, which seem to assume the existence of any facts, or to be any intimation as to what is proved, all such expressions must be disregarded and the *evidence only* looked to to determine the facts." It is difficult to see, how, after such a clear and explicit injunction as this, the jury could have made any finding, that was not based on the evidence.

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As to the first objection, if we construed the instruction to mean what counsel claim it to mean, we would be forced to agree with them, that it was erroneous.

It is the duty of the jury to consider all the instructions together, and when this court can see that an instruction in the series, although not stating the law correctly, is qualified by others, so that the jury were not likely to be misled, the error will be obviated. *Toledo, Wabash and Western Ry. Co. v. Ingraham*, 77 Ill. 309.

Although an instruction, considered by itself, is too general, yet if it is properly limited by others given on the other side, so that it is not probable it could have misled the jury, judgment will not be reversed on account of such instruction. *Kendall v. Brown*, 86 Ill. 387; *Skiles v. Caruthers*, 88 id. 458.

The Supreme Court of Iowa has said: "It is usually not practicable, in any one instruction, to present all the limitations and restrictions of which it is susceptible. These very frequently must be presented in other and distinct portions of the charge. The charge must be taken together, and, if, when so considered, it fairly presents the law and is not liable to misapprehension nor calculated to mislead, a cause should not be reversed, simply because some one of the instructions may lay down the law without sufficient qualification." *Rice v. City of Des Moines*, 40 Iowa, 638.

The same court held in a criminal case, where the indictment was for murder, that "instructions are all to be considered and construed together," and that an omission to state the law fully in one instruction, when the omission is fully supplied in another, does not constitute error. *State v. Maloy*, 44 Iowa, 104.

The Supreme Court of California said in a criminal case: "While some of the instructions are perhaps subject to criticism and may not state the law with precise accuracy, yet, taken as a whole, they were substantially correct and could

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not have misled the jury to the prejudice of the defendant." *The People v. Cleveland*, 49 Cal. 577.

The principle here announced, that an instruction, which is general in its character, may be limited or qualified by other instructions in the series, does not contravene the rule, that in a criminal case "material error in one instruction calculated to mislead is not cured by a subsequent contradictory instruction." Wharton on Crim. Pl. and Pr. (8th ed.) sec. 793.

An application of the foregoing views to the instruction now under consideration will show that it could not have misled the jury to the prejudice of the defendants.

Counsel contend, that the language of instruction No. 5½ was broad enough to lead the jury to believe, that, if some person other than either of the plaintiffs in error had advised and encouraged the commission of the murder and the murder had been committed by reason of his advice and encouragement, the plaintiffs in error would be guilty, provided such person was a party with them to the conspiracy to excite to crime, etc. The instructions for the defence, however, limited the responsibility of the defendants to such advice and encouragement as were given by themselves alone.

In one instruction given for the defence, the court charged the jury as follows: "Unless the prosecution has established in the minds of the jury, beyond all reasonable doubt, that either some of the defendants threw the said bomb, or that *the person, who did so throw the same, was acting under the advice and procurement of defendants or some of them*, the defendants and all of them should be acquitted."

In another instruction given for the defence the court said: "It will not do to guess away the lives or liberties of our citizens nor is it proper that the jury should guess that *the person, who threw the bomb which killed Degan, was instigated to do the act by the procurement of defendants or any of them*. That fact

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must be established beyond all reasonable doubt in the minds of the jury," etc.

In still another instruction for the defence the court said; "Therefore the jury must be satisfied beyond all reasonable doubt, that *the person throwing said bomb was acting as the result of the teaching or encouragement of defendants or some of them*, before defendants can be held liable therefor, and this you must find from the evidence."

Counsel also claim, that the instruction now under consideration may be construed to mean, that *mere general advice*, in print or by speech, addressed to the public at large, urging them to commit deeds of violence, works responsibility for murder. If the instruction was too general in this regard, it was limited and qualified by other instructions given for the defendants.

In an instruction given for the defence the court said to the jury: "It will not do to say that, because defendants *may have advised violence*, that, therefore when violence came, it was the result of such advice. There must be a direct connection established by credible testimony between the advice and the consummation of the crime, to the satisfaction of the jury beyond all reasonable doubt."

In another instruction for the defence—and all the instructions for the defence were prepared by the defendants themselves and the giving of them was asked by the defendants—the court said: "Before a party can be lawfully convicted of the commission of a crime under our statute concerning accessories, it is incumbent on the prosecution to show beyond all reasonable doubt, by credible evidence, that the crime was committed by some persons or person acting under the advice, aid, encouragement, abetting or procurement of the defendant or defendants, whose conviction is asked. Though the jury should believe from the evidence, that a party in fact *advised generally* the commission, in certain contingencies, of acts amounting to crime, yet if the act complained of was in

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fact committed by some third party of his own mere volition, hatred, malice or ill-will, and not materially influenced, either directly or indirectly, by such advice of the party charged, or if he was actuated only by the advice of other parties not charged, and for whose advice the defendants are not responsible, the party charged would not in such case be responsible."

In another instruction for the defence, the court said : "Although the defendants or some of them may have spoken and also published their views to the effect that a social revolution should be brought about by force, and that the officers of the law should be resisted, and, to this end, dynamite should be used to the extent of taking human life, that persons should arm to resist the law, that the law should be throttled and killed ; and *although such language might cause persons to desire to carry out the advice given as aforesaid*, and do the act which caused officer Degan's death, yet the bomb may have been thrown and Degan killed by some one unfamiliar with and unprompted by the teachings of defendants or any of them. Therefore, the jury must be satisfied, beyond all reasonable doubt that the person throwing said bomb was acting as the result of the teaching or encouragement of defendants," etc.

The instruction last quoted, which was drawn by the counsel for the defence and given at their request, recognizes and admits the claim, that advising, encouraging, aiding and abetting murder, within the meaning of our statute, may be effected through the utterance of such speeches and the publication of such articles as have been heretofore referred to. The only thing insisted upon in the instruction is, that the proof must show, clearly and beyond a reasonable doubt, the connection between the speeches and publications, as the cause, and the murder as the result.

The last instruction given for the defendants limited the instructions, having reference to general advice to commit

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murder or general conspiracy to commit murder, by calling the attention of the jury specifically to the Monday night plot. It was as follows:

"If the jury find that on the evening of May 3 at 54 West Lake street, at a meeting at which some of the defendants were present, a proposition was adopted, that in the event of a collision between the police force, militia or firemen on one side, and the striking laborers on the other, it was agreed, that certain organizations of which some of the defendants were members, should meet at certain designated places in the city of Chicago, that a committee should attend public places and public meetings where an attack by the police and others might be expected, and in the event of such attack being made, report the same to said armed sections, as aforesaid, to the end that such attack might be resisted and the police stations of the city destroyed, and if the jury further find that, on the night of May 4, some person unknown went to a meeting at the Haymarket and threw a bomb into the assembled police, the explosion of which killed Matthias J. Degan, and that from all the evidence in the case the jury are not satisfied beyond all reasonable doubt, that said act causing the death of said Degan was the result of any act *in furtherance of the common design as herein stated*, but may have been the unauthorized and the individual act of some person acting upon his own responsibility and volition, then none of the defendants can be held responsible therefor on account of said West Lake street meeting."

But instruction No. 5½ will not be found to be so general in character, as it is claimed to be, if its language is carefully analyzed and considered in connection with other instructions given for the State.

The persons referred to therein as being excited to tumult and riot and to the use of deadly weapons and to the taking of life, are "the people or classes of people of this city." The expression is in the alternative. "Classes of people of this

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city" are words, which, when construed in the light of the evidence in this record, could only have been understood to designate workingmen of the city of Chicago connected with the groups already referred to. The persons, advised by print or speech to commit murder, were the same persons, who were excited to tumult and riot, etc. Therefore, the instruction fairly interpreted means, that the persons advised to commit murder were the workingmen belonging to and acting with the International groups, and that the murder spoken of as resulting from the advice given was murder committed by one or more of such workingmen. It is said, that the instruction does not indicate the murder of Degan, but speaks simply of murder generally. It was not necessary to repeat the name of Degan in every instruction. The instructions must be considered together, and as Degan's name was mentioned in the two instructions preceding and the one following No. 5½, the jury could not have been misled upon this subject. The words "whether the person, who perpetrated such murder can be identified or not," could have referred to no one else than the man, who threw the bomb that killed Degan.

The words "without designating time, place or occasion" must be taken with the qualification given to them in the fifth instruction, that is to say, such time, place and occasion as the committee of the conspirators appointed for that purpose might designate.

According to the theory of this instruction, the defendants conspired to excite certain classes to tumult, riot, use of weapons and taking of life, "as a means to carry their designs and purposes into effect." The instruction does not specify what those designs and purposes are, because they had been stated in the two preceding instructions to be the bringing about of a social revolution and the destruction of the authorities of the city. The ordinary workingman had two purposes in view, first, to get an eight-hour day of labor, second, to

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keep the police from interfering to protect non-union laborers against strikers. The defendants in this case cared nothing about the eight-hour movement or the contentions between union and non-union men. They looked beyond to the social revolution. They sought to make use of the excitement among the workingmen over the eight-hour movement and over the attacks of police upon strikers, in order to create riot and tumult and thus precipitate the social revolution. The stirring up of riot and tumult was with them a means to an end. There is testimony tending to support this view. The men, who excited the tumult and riot by print and speech, may have had a different end in view from that sought by the classes whom they so excited. But they were none the less responsible for murder that resulted from their aid and encouragement.

If the defendants, as a means of bringing about the social revolution and as a part of the larger conspiracy to effect such revolution, also conspired to excite classes of workingmen in Chicago into sedition, tumult and riot and to the use of deadly weapons and the taking of human life, and for the purpose of producing such tumult, riot, use of weapons and taking of life, advised and encouraged such classes by newspaper articles and speeches to murder the authorities of the city, and a murder of a policeman resulted from such advice and encouragement, then defendants are responsible therefor.

It is a familiar doctrine of the law, in criminal cases, that, if a reasonable doubt of the guilt of the prisoner is entertained, the jury have no discretion, but must acquit. The twelfth and thirteenth instructions for the prosecution are objected to as not correctly stating to the jury the meaning of "reasonable doubt." The twelfth instruction is an exact copy, *verbatim et literatim*, of the sixth instruction in *Miller et al. v. The People*, 39 Ill. 457, which we approved in that case, and which, since that case, we have endorsed as correct in at least three cases, to-wit: *May v. The People*, 60 Ill. 119,

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Connaghan v. The People, 88 id. 460, and *Dunn v. The People*, 109 id. 635.

The portion of the thirteenth instruction, which plaintiffs in error complain of, is that which is contained in the following words: "You are not at liberty to disbelieve as jurors if from the evidence you believe as men." This expression has been sanctioned by the Supreme Court of Pennsylvania as having been properly used in an instruction given to the jury by a trial judge, and we are inclined to follow the ruling there laid down. That court said in *Nevling v. Commonwealth*, 98 Pa. St. 322: "The learned judge then proceeded to say that the doubt must be a reasonable one, and that jurymen could not doubt as jurymen what they believed as men. In all this there was no error. It is the familiar language found in the text-books and decisions which treat of the subject."

By the twelfth and thirteenth instructions, considered in connection with the eleventh instruction for the State and also in connection with the definitions of reasonable doubt as embodied in the instructions given for the defence, we think the law upon this subject was correctly presented to the jury.

The statute of this State provides that "juries in all criminal cases shall be judges of the law and fact." Instruction No. 13½, given for the prosecution, is objected to as improperly limiting and qualifying this provision of the statute. It tells the jury, that "if they can say upon their oaths that they know the law better than the court itself, they have the right to do so" . . . but that "before saying this, upon their oaths, it is their duty to reflect whether from their study and experience they are better qualified to judge of the law than the court," etc.

The language of instruction No. 13½ is an exact copy, *verbatim et literatim*, of the language used by this court in *Schnier v. The People*, 23 Ill. 17. The views expressed in *Schnier v. The People* have been approved of and indorsed in *Fisher v. The People*, 23 Ill. 283, *Mullinix v. The People*,

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76 id. 211, and *Davison v. The People*, 90 id. 221. The question is settled, and we see no reason to retreat from our position upon this subject.

It is also claimed that the court erred in refusing to give certain instructions asked by the defendants. The refusal of refused instructions numbered 3, 8, 9, 11 and 18 is especially insisted upon as error.

Instruction No. 3 was properly refused because it told the jury, that those of the defendants, who were not *present at the Haymarket*, counseling, aiding or abetting the throwing of the bomb, should be acquitted. Under our statute and the decision of this court in *Brennan v. The People*, 15 Ill. 511, the defendants were guilty, if they advised and encouraged the murder to be committed, although they may not have been present.

Instruction No. 8 was wrong for a number of reasons, but it is sufficient to refer to one: it assumes that "a conspiracy to bring about a change of government . . . by peaceful means if possible, but, if necessary, to resort to force for that purpose" is not unlawful. The fact that the conspirators may not have intended to resort to force, unless, in their judgment, they should deem it necessary to do so, would not make their conspiracy any the less unlawful.

All that was material in instructions 9, 11 and 18 was embodied in the instructions which were given for the defendants.

The defendants also complain that the court refused to give an instruction for them, which contained the following statement: "It can not be material in this case that defendants or some of them, are or may be socialists, communists or anarchists," etc.

If there was a conspiracy, it was material to show its purposes and objects with a view of determining whether and in what respects it was unlawful. Anarchy is the absence of government; it is a state of society, where there is no law or

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supreme power. If the conspiracy had for its object the destruction of the law and the government, and of the police and militia as the representatives of law and government, it had for its object the bringing about of practical anarchy. Whether or not the defendants were anarchists may have been a proper circumstance to be considered in connection with all the other circumstances in the case, with a view of showing what connection, if any, they had with the conspiracy and what were their purposes in joining it. Therefore, we can not say, that it was error to refuse an instruction, containing such a broad declaration as that announced in the above quotation.

Defendants further complain because the instruction, numbered 13, which was asked by them, was refused by the trial court. The refusal of this instruction was not error. It was proper enough, so far as it stated, that, if a person at the Haymarket "without the knowledge, aid, counsel, procurement, encouragement or abetting of the defendants or any of them, then or theretofore given . . . threw a bomb among the police, wherefrom resulted the murder or homicide charged in the indictment, then the defendants would not be liable for the results of such bomb," etc. But the instruction is so ingeniously worded as to lead the jury to believe, that the person, who threw the bomb at the Haymarket, was justified in doing so, if the meeting there was lawfully convened and peaceably conducted and if the order to disperse was unauthorized and illegal. Counsel inject into the instruction the hypothesis that the bomb may have been thrown by an outside party "in pursuance of his view of the right of self-defence." A mere order to disperse can not be an excuse for throwing a dynamite bomb into a body of policemen. If the bomb-thrower had been illegally and improperly attacked by the police, while quietly attending a peaceable meeting and had thrown the bomb to defend himself against such attack, another question would be presented. The vice of the instruc-

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tion lies in the insidious intimation embodied in it, that, when a body of policemen even if in excess of their authority give a verbal order to an assemblage to disperse, a member of that assemblage will be excusable for throwing a bomb on the ground of self-defence and because of the supposed invasion of his rights.

The instruction, given by the court of its own motion and which has already been referred to, is also claimed to be erroneous. So far as it speaks of murder and advice to commit murder in general terms, it is sufficiently limited and qualified when read in connection with all the other instructions, to which it specifically calls attention. It does not supersede and stand as a substitute for the other instructions, given for both sides. It does not so purport upon its face. On the contrary the jury are directed to "carefully scrutinize" such other instructions, and are told that their apparent inconsistencies will disappear under such scrutiny. In the last sentence they are requested to disregard any unguarded expressions that may have crept into the instructions, "which seem to assume the existence of any facts," and look only to the evidence, etc. Why caution the jury to disregard certain expressions of a particular kind in the other instructions, if the latter were to be entirely superseded? We do not think that the instruction, given by the trial judge *suo motu* is obnoxious to the objections urged against it.

Defendants also object to the instruction as to the form of the verdict as being erroneous. It is claimed, that the jury were obliged, under this instruction, to find the defendants either guilty or not guilty of murder, whereas the jury were entitled to find that the offence was a lower grade of homicide than murder, if the evidence so warranted. This position is fully answered by our decisions in the cases of *Dunn v. The People*, 109 Ill. 646, and *Dacey v. The People*, 116 id. 555. If counsel desired to have the jury differently instructed as to the form of the verdict, they should have prepared an instruc-

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tion, indicating such form as they deemed to be correct, and should have asked the trial court to give it. They did not do so, and are in no position to complain here.

The court, at the request of the defendants, did give the jury an instruction, defining manslaughter in the words of the statute and specifying the punishment therefor as fixed by the statute. The court also gave the jury the following instruction: "The jury are instructed, that under an indictment for murder a party accused may be found guilty of manslaughter; and in this case, if from a full and careful consideration of all the evidence before you, you believe beyond a reasonable doubt, that the defendants or any of them are guilty of manslaughter, you may so find by your verdict."

The next error assigned has reference to the impaneling of the jury. The counsel for plaintiffs in error have made an able and elaborate argument for the purpose of showing that the jury, which tried this case, was not an *impartial* jury in the sense in which the word, "*impartial*," is used in our constitution. We do not deem a consideration of all the points presented as necessary to a determination of the case, and shall only notice those that seem to us to be material.

Nine hundred and eighty-one men were called into the jury box and sworn to answer questions. Each one of the eight defendants was entitled to a peremptory challenge of twenty jurors, making the whole number of peremptory challenges, allowed to the defence, one hundred and sixty. The State was entitled to the same number. Seven hundred and fifty-seven were excused upon challenge for cause. One hundred and sixty were challenged peremptorily by the defence and fifty-two by the State.

Of the twelve jurors, who tried the case, eleven were accepted by the defendants. They challenged one of these, whose name was Denker, for cause, but, after the court overruled the challenge, they proceeded to further question him and finally accepted him, although one hundred and forty-

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two of their peremptory challenges were at that time unused. They accepted the ten others, including the juror Adams, without objection. When Adams, the eleventh juror, was taken, they had forty-three peremptory challenges, which they had not yet used.

Therefore, as to eleven of the jurymen, the defendants are estopped from complaining. They virtually agreed to be tried by them, because they accepted them, when, by the exercise of their unused peremptory challenges, they could have compelled every one of them to stand aside.

Counsel for the defence complain, that the trial court overruled their challenges for cause of twenty-six talesmen, to whose examinations they specifically call our attention. As they afterwards peremptorily challenged the talesmen so referred to, no one of them sat upon the jury. Every one of these twenty-six men had been peremptorily challenged before the eleventh juror was taken.

After the eleventh juror was accepted, the forty-three peremptory challenges, which then remained to the defendants, were all used by them before the twelfth juror was taken.

After the defendants had examined the twelfth juror, whose name was Sanford, they challenged him for cause. Their challenge was overruled and they excepted.

The one hundred and sixty talesmen, who were peremptorily challenged by defendants, were first challenged for cause and the challenges for cause were overruled by the trial court. It is claimed that, inasmuch as the defendants exhausted all their peremptory challenges before the panel was finally completed, the action of the court in regard to these particular jurors will be considered, and, if erroneous, such action is good ground of reversal. We think it must be made to appear that an objectionable juror was put upon the defendants after they had exhausted their peremptory challenges. "Unless objection is shown to some one or more of the jury, who *tried* the case, the antecedent rulings of the court upon the competency

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or incompetency of jurors, who have been challenged and stood aside, will not be inquired into in this court." *Holt v. State*, 9 Texas Ct. App. 571.

We can not reverse this judgment for errors committed in the lower court in overruling challenges for cause to jurors, even though defendants exhausted their peremptory challenges unless it is further shown that an objectionable juror was forced upon them and sat upon the case after they had exhausted their peremptory challenges. This doctrine is ably discussed in *Loggins v. State*, 12 Texas Ct. App. 65. We think the reasoning in that case is sound and answers the objection here made.

In addition to this reason, we have carefully considered the examinations of the several jurors challenged by the defendants peremptorily, and while we can not approve all that was said by the trial judge in respect to some of them, we find no such error in the rulings of the court in overruling the challenges for cause as to any of them as would justify a reversal of the cause. The examinations, as they appear in the record, of the forty-three talesmen, who were challenged peremptorily after the eleventh juror was accepted, show that many of the forty-three challenges were exercised arbitrarily and without any apparent cause. Such challenges were not compelled by any demonstrated unfitness of the jurors, but seem to have been used up for no other purpose than to force the selection of one juror, after the forty-three challenges were exhausted.

The only question, then, which we deem it material to consider, is: Did the trial court err in overruling the challenge for cause of Sanford, the twelfth juror, or, in other words, was he a competent juror?

The following is the material portion of his examination:

"Have you an opinion as to whether or not there was an offence committed at the Haymarket meeting by the throwing of the bomb? A. Yes. Q. Now, from all that you have read

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and all that you have heard have you an opinion as to the guilt or innocence of any of the eight defendants of the throwing of that bomb? A. Yes. Q. You have an opinion upon that question also? A. I have. . . . Now if you should be selected as a juror in this case to try and determine it, do you believe that you could exercise legally the duties of a juror, that you could listen to the testimony and all of the testimony and the charge of the court and after deliberation return a verdict, which would be right and fair as between the defendants and the People of the State of Illinois? A. Yes sir. Q. You believe that you could do that? A. Yes sir. Q. You could fairly and impartially listen to the testimony that is introduced here? A. Yes. Q. And the charge of the court and render an impartial verdict you believe? A. Yes. Q. Have you any knowledge of the principles contended for by socialists, communists and anarchists? A. Nothing except what I read in the papers. Q. Just general reading? A. Yes. Q. You are not a socialist, I presume, or a communist? A. No sir. Q. Have you a prejudice against them from what you have read in the papers? A. Decided. Q. Do you believe that that would influence your verdict in this case or would you try the real issue which is here as to whether these defendants were guilty of the murder of Mr. Degan or not, or would you try the question of socialism and anarchism, which really has nothing to do with the case? A. Well as I know so little about it in reality at present it is a pretty hard question to answer. Q. You would undertake, you would attempt of course to try the case upon the evidence introduced here upon the issue which is presented here? A. Yes, sir. . . . Q. Well, then, so far as that is concerned I do not care very much what your opinion may be now, for your opinion now is made up of random conversations and from newspaper reading, as I understand? A. Yes. Q. That is nothing reliable. You do not regard that as being in the nature of sworn testimony at all, do you? A. No. Q. Now,

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when the testimony is introduced here and the witnesses are examined, you see them and look into their countenances, judge who are worthy of belief and who are not worthy of belief, don't you think then you would be able to determine the question? A. Yes. Q. Regardless of any impression that you might have or any opinion? A. Yes. Q. Have you any opposition to the organization by laboring men of associations or societies or unions so far as they have reference to their own advancement and protection and are not in violation of law? A. No sir. Q. Do you know any of the members of the police force of the city of Chicago? A. Not one by name. Q. You are not acquainted with any one, that was either injured or killed, I suppose, at the Haymarket meeting? A. No. . . . Q. If you should be selected as a juror in this case, do you believe that regardless of all prejudice or opinion, which you now have, you could listen to the legitimate testimony introduced in court, and upon that and that alone, render and return a fair and impartial, unprejudiced and unbiased verdict? A. Yes."

The foregoing examination was by the defence. The following was by the State:

"Q. Upon what is your opinion founded—upon newspaper reports? A. Well, it is founded on the general theory and what I read in the newspapers. Q. And what you read in the papers? A. Yes sir. Q. Have you ever talked with any one that was present at the Haymarket at the time the bomb was thrown? A. No sir. Q. Have you ever talked with any one who professed of his own knowledge to know anything about the connection of the defendants with the throwing of that bomb? A. No. Q. Have you ever said to any one whether or not you believed the statements of facts in the newspapers to be true? A. I have never expressed it exactly in that way, but still I have no reason to think they were false. Q. Well, the question is not what your opinion of that was. The question simply is—it is a question made necessary by

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our statute, perhaps? A. Well, I don't recall whether I have or not. Q. So far as you know then you never have? A. No sir. Q. Do you believe, that, if taken as a juror, you can try this case fairly and impartially and render a verdict upon the law and the evidence? A. Yes."

It is objected, that Sanford had formed such an opinion as disqualified him from sitting upon the jury.

It is apparent from the foregoing examination, that the opinion of the juror was based upon rumor or newspaper statements, and that he had expressed no opinion as to the truth of such rumors or statements. He stated upon oath that he believed he could fairly and impartially render a verdict in the case in accordance with the law and the evidence. That the trial court was satisfied of the truth of his statement would appear from the fact, that the challenge for cause was overruled.

Therefore, the examination of the juror shows a state of facts, which brings his case exactly within the scope and meaning of the third proviso of the 14th section of chapter 78, entitled "Jurors," of our Revised Statutes. That proviso is as follows: "*And provided further*, that in the trial of any criminal cause, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion) shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes he can fairly and impartially render a verdict therein, in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement."

In *Wilson v. The People*, 94 Ill. 299, one William Gray was examined touching his qualifications as a juror and said: "I have read newspaper accounts of the commission of the crime with which the defendant is charged, and have also conversed with several persons in regard to it since coming to Carthage and during my attendance upon this term of court; do not

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know whether they are witnesses in the case or not; do not know who the witnesses in the case are. From accounts I have read and from conversations I have had, I have formed an opinion in the case; would have an opinion in the case now, if the facts should turn out as I heard them, and I think it would take some evidence to remove that opinion; would be governed by the evidence in the case and can give the defendant a fair and impartial trial according to the law and the evidence." Gray was challenged for cause and the challenge overruled by the trial court. We held that all objection to Gray's competency was clearly removed by the proviso above quoted. We also there said: "The opinion formed seems not to have been decided, but one of a light and transient character which, at no time, would have disqualifies the juror from serving."

The expressions of Sanford in the case at bar as to the opinion formed by him are not so strong as those used by Gray in the *Wilson case* in regard to his opinion. Sanford's impressions were not such as would refuse to yield to the testimony that might be offered, nor were they such as to close his mind to a fair consideration of the testimony. They were not "strong and deep impressions," such as are referred to by Chief Justice MARSHALL when he said upon the trial of Aaron Burr for treason: "Those strong and deep impressions, which will close the mind against the testimony which may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection" to a juror. (1 Burr's Trial, 416.)

Counsel for the defence seem to claim in their argument, that the proviso above quoted is unconstitutional in that it violates section 9 of article 2 of the present constitution of this State, which guarantees to the accused party in every criminal prosecution "a speedy public trial by *an impartial jury* of the county or district in which the offence is alleged to have been committed." We do not think that the proviso

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is unconstitutional for the reason stated. The rule, which it lays down, when wisely applied, does not lead to the selection of partial jurors. On the contrary, it tends to secure intelligence in the jury-box and to exclude from it that dense ignorance, which has often subjected the jury system to just criticism. A statute upon this subject, similar to ours and attacked as unconstitutional for the same reason here indicated, was held to be constitutional by the Court of Appeals in the State of New York in *Stokes v. The People*, 53 N. Y. 171.

The juror Sanford further stated that he had a prejudice against socialists, communists and anarchists. This did not disqualify him from sitting as a juror. If the theories of the anarchists should be carried into practical effect, they would involve the destruction of all law and government. Law and government can not be abolished without revolution, bloodshed and murder. The socialist or communist, if he attempted to put into practical operation his doctrine of a community of property, would destroy individual rights in property. Practically considered the idea of taking a man's property from him without his consent, for the purpose of putting it into a common fund for the benefit of the community at large, involves the commission of theft and robbery. Therefore, the prejudice, which the ordinary citizen, who looks at things from a practical standpoint, would have against anarchism and communism, would be nothing more than a prejudice against crime.

In *Winneskeik Insurance Co. v. Schueler*, 60 Ill. 465, we said: "A man may have a prejudice against crime, against a mean action, against dishonesty, and still be a competent juror. This is proper, and such prejudice will never force a juror to prejudge an innocent and an honest man." In *Robinson et al. v. Randall*, 82 Ill. 521, we again said: "The mere fact, therefore, that a juror may have a prejudice against crime does not disqualify him as a juror. A juror may be prejudiced against larceny, or burglary, or murder, and yet such fact

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would not in the least disqualify him from sitting upon a jury to try some person, who might be charged with one of these crimes."

San ord stated, that he would "attempt to try the case upon the evidence introduced here upon the issue which is presented here." The issue presented was whether the defendants were guilty or not guilty of the murder of Matthias J. Degan. Any prejudice against communism or anarchism would not render a juror incapable of trying that issue fairly and impartially.

We can not see that the trial court erred in overruling the challenge for cause of the twelfth juror. This being so, it does not appear that the defendants were injured, or that their rights were in any way prejudiced by his selection as a jurymen.

On the motion for a new trial the defendants read three affidavits for the purpose of showing that, shortly after May 4, 1886, two of the jurors had given utterance to expressions, showing prejudice against the defendants. The two jurors made counter-affidavits denying that they used the expressions attributed to them.

We do not think that the affidavits satisfactorily proved previously expressed opinions on the part of the two jurors referred to. It is a dangerous practice to allow verdicts to be set aside upon *ex parte* affidavits as to what jurors are claimed to have said, before they were summoned to act as jurymen. The parties making such affidavits submit to no cross-examination and the correctness of their statements is subjected to no test whatever. We adhere to the views which we have recently expressed upon this subject in the case of *Hughes v. The People*, 116 Ill. 330.

The defendants claim that, although they were entitled to one hundred and sixty peremptory challenges, yet the State was entitled to only twenty, and they charge it as error that the State was allowed to peremptorily challenge more than

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twenty talesmen. The statute says: "The attorney prosecuting on behalf of the People shall be admitted to a peremptory challenge of the same number of jurors that the accused is entitled to." (Rev. Stat. chap. 38, sec. 432.) We can not conceive how language can be plainer than that here used. It explains itself and requires no further remark.

The defendants also claim that the trial court erred in refusing a separate trial, from the other defendants, to the defendants Spies, Schwab, Fielden, Neebe and Parsons. Error can not be assigned upon the refusal to grant separate trials, where several are jointly indicted. It was a matter of discretion with the court below. We so decided in *Maton et al. v. The People*, 15 Ill. 536. We are unable to see any abuse of the discretion in this case.

Defendants also take exceptions to the conduct of the special bailiff. The regular panel having been exhausted and the defendants having objected "to the sheriff summoning a sufficient number of persons to fill the panel" of jurors, the court appointed a special bailiff named Ryce to summon such persons under section 13, chapter 78, of the Revised Statutes. On the motion for new trial, defendants read the affidavit of one Stevens, in which Stevens swore that he had heard one Favor say, that he, Favor, had heard Ryce say, that he, Ryce, was summoning as jurors such men as the defence would be compelled to challenge peremptorily, etc. The defendants then made a motion, based upon this affidavit, that Favor be compelled to come into court and testify to what Ryce had said to him. The refusal of the court to grant the application is complained of as error.

The statements in the affidavit were mere hearsay and were too indefinite and remote to base any motion upon. Moreover, if Ryce did make the remark in question to Favor, it does not appear that defendants were harmed by it. There is nothing to show that Ryce made any remarks of any kind, proper or improper, to the jurors whom he summoned. In

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addition to this, it is not shown that the defendants served Favor with a subpoena so as to lay a foundation for compelling his attendance.

We think that the course, pursued on the trial in regard to the manner of impaneling the jury, was correct and in accordance with the plain meaning of section 21, chapter 78, of the Revised Statutes. That section says "that the jury shall be passed upon and accepted in panels of four by the parties, commencing with the plaintiff." The State is not called upon to tender the defendants a second panel before the defendants tender it back four.

We can not see that the remarks of the State's attorney in his argument to the jury were marked by any such improprieties, as require a reversal of the judgment. *Wilson v. The People, supra,* and *Garrity v. The People*, 107 Ill. 162.

In their lengthy argument counsel for the defence make some other points of minor importance, which are not here noticed. As to these, it is sufficient to say that we have considered them and do not regard them as well taken.

The judgment of the Criminal Court of Cook county is affirmed.

Judgment affirmed.

MR. JUSTICE MULKEY: Not intending to file a separate opinion, as I should have done had health permitted, I desire to avail myself of this occasion to say from the bench, that while I concur in the conclusion reached, and also in the general view presented in the opinion filed, I do not wish to be understood as holding that the record is free from error, for I do not think it is. I am nevertheless of opinion that none of the errors complained of are of so serious a character as to require a reversal of the judgment.

In view of the number of defendants on trial, the great length of time it was in progress, the vast amount of testimony offered and passed upon by the court, and the almost numberless rulings the court was required to make, the won-

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der with me is, that the errors were not more numerous and more serious than they are.

In short, after having carefully examined the record, and given all the questions arising upon it my very best thought, with an earnest and conscientious desire to faithfully discharge my whole duty, I am fully satisfied that the conclusion reached vindicates the law, does complete justice between the prisoners and the State, and that it is fully warranted by the law and the evidence.

LOUIS YECK

v.

GEORGE W. CRUM.

Filed at Springfield September 27, 1887.

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1. **MISTAKE**—in conveyance of land, being other than the land sold—*mortgagee of the grantee without notice*. Where a party owning five forty-acre tracts, lying in a line north and south, sold the north forty-acre tract, but by mistake in his deed conveyed the south forty-acre tract, having the same description as the tract sold, except being in another section, and the grantee mortgaged the tract so conveyed to him, and the grantor afterward filed his bill to set aside such mortgage as a cloud on the title of his south forty acres, it was held, that he was not entitled to the relief sought, without showing that the mortgagee took his mortgage with a knowledge of the grantor's rights, or under such circumstances as to put him upon inquiry in respect of such right.

2. **SAME**—of notice to mortgagee—possession, whether sufficient notice—*examination of record sufficient*. The owner of several forty-acre tracts of land, lying together, sold one of them, but by mistake conveyed another one of the tracts. The grantee took possession of the tract in fact sold, and the grantor continued in the possession of the tract conveyed. The grantee, in giving a mortgage, described the land as in his deed. Afterward he borrowed \$1000 to take up this mortgage, and gave a similar mortgage to secure the same. He informed the second mortgagee that the land was that conveyed to him, and by him mortgaged to the first mortgagee. The second mortgagee examined the record, and found the legal title in such party, subject to the prior mortgage. The second mortgagee knew that the mortgagor

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resided on one of the forty-acre tracts, and that his grantor resided on another, but was not acquainted with their location by their numbers, and had no actual notice of the mistake in the deed: *Held*, that the mortgagee, in examining the records, exercised all the care and made all the inquiry that could reasonably be expected of him, and that he should not lose his debt on account of the mistake in the original deed.

3. *SAME—third persons protected as against the mistake or fraud of another.* It is a fundamental doctrine of equity that where one of two persons must suffer by the fraud of a third person, the loss must fall upon him who, by his negligence or conduct, put it in the power of such third person to cause the injury. So when a party, by mistake in his deed, conveys a tract of his land not intended, and his grantee, in ignorance of such mistake, incumbers the land conveyed, and afterward the grantee conveys the tract he in fact bought, and the original grantor, in violation of an agreement with the mortgagee, makes a conveyance of the right tract, which injures to the benefit of the second purchaser, and takes back from his grantee a deed for the land actually conveyed, so that the mortgagee can not have his mortgage placed upon the proper tract, such grantor can not, in a court of equity, have the mortgage set aside as a cloud on his title, but must suffer the loss caused by his own conduct.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Cass county; the Hon. LYMAN LACEY, Judge, presiding.

Messrs. POLLARD & PHILLIPS, for the appellant.

Messrs. KETCHAM & GRIDLEY, for the appellee.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

George W. Crum, appellee, was the owner of a farm of two hundred acres, in Cass county, Illinois, composed of five forty-acre tracts, lying north and south of each other, the north forty being the north-east quarter of the south-east quarter of section 26, and the south forty of the two hundred acres being the north-east quarter of the south-east quarter of section 35, all in township 17 north, range 11, west of the third principal meridian. It will be observed that the descriptions of the north and south forty-acre tracts are identical, except that one is in section 26 and the other in section 35. The dwelling

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house, barn, orchard, etc., of the appellee were on the forty in section 35, which was occupied by him, as his homestead, at the time of the conveyance to George A. Crum.

On the 6th day of May, 1881, appellee bargained and sold to his cousin, George A. Crum, the north forty-acre tract,—*i.e.*, the north-east quarter of the south-east quarter of section 26,—for the sum of \$2000, but by the mistake of the scrivener in preparing the deed, conveyed to said George A. the south forty-acre tract,—that is, the north-east quarter of the south-east quarter of section 35, instead of the north forty, as intended. The grantee, George A. Crum, went into possession of the forty on section 26, filing his deed for record May 9, 1881. No change of possession of the forty on section 35 occurred, appellee continuing in the occupancy thereof. On the 9th of May, 1881,—the same day of recording the deed of appellee to himself,—George A. Crum borrowed of William Epler \$1000, and, to secure the payment thereof, executed a mortgage to Epler, on the north-east quarter of the south-east quarter of section 35, following the description in his deed from appellee. May 1, 1883, the money secured by the mortgage to Epler having become due, George A. Crum borrowed of appellant \$1000, and with it took up and cancelled the Epler mortgage, and to secure appellant in this loan, executed and delivered to him a mortgage on the same tract of land,—that is, the north-east quarter of the south-east quarter of section 35, following the description in the deed from appellee and the mortgage to Epler. On the 10th day of August, 1883, George A. Crum, by his deed duly made, and recorded the same day, conveyed to Oswell Skiles the north forty-acre tract,—that is, the north-east quarter of the south-east quarter of section 26, being the tract purchased by him of appellee: About this time the mistake in the deed from appellee to said George A., and in the mortgages mentioned, was first discovered, and appellee and appellant at once called on said George A., who promised "to straighten matters up" by paying appellant, ap-

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pellant agreeing to release the mortgage on appellee's land when his debt was paid. George A. Crum neglected to pay appellant, and finally, when urged to do so, refused to pay or secure him, alleging, as a reason for such refusal, that his cousin, appellee, had mistreated him. Several meetings of the parties seem to have occurred, and considerable effort made to adjust the matter, without avail. During the negotiations respecting it, appellant requested appellee not to make or deliver a deed for the forty acres on section 26 until the debt due appellant was satisfied; and we think the weight of evidence clearly shows that appellee then agreed that he would comply with this request, and would not correct the mistake, but would retain the legal title until Yeck's debt was paid or secured. In November, 1883, appellee, without notifying appellant of his intention to do so, executed and delivered to George A. Crum a warranty deed, conveying to him the said north-east quarter of the south-east quarter of section 26, reciting that the deed was made for the purpose of correcting the mistake in the deed of May 6, 1881. On the 30th day of November, 1883, a deed dated November 7, 1883, from George A. Crum to appellee, was filed for record, conveying the north-east quarter of the south-east quarter of section 35 to appellee. George A. Crum was then, and still is, insolvent.

In the bill of appellee, in addition to the fact of the conveyance to George A., the mistake therein, the execution of the mortgage to Yeck, the relative location of the tracts of land, and the occupation of each, it was alleged, in substance, that appellant was well acquainted with appellee's farm, and knew that George A. Crum had, at the time of the execution of the mortgage to Yeck, no title to the land in the mortgage mentioned, but that the tract therein described was complainant's homestead. It is also alleged that appellant was negligent in not endeavoring to ascertain the fact, and took no other means of learning that his mortgage described the tract owned by said George A. than by comparison with the Epler mort-

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gage. The answer of Yeck denies all knowledge that the premises mortgaged belonged to appellee, and sets up that he carefully examined the record, and found the title to the property mortgaged was in the said George A. Crum. These averments present the only question of fact really in dispute in the case.

That it was material for appellee to show that appellant took his mortgage with knowledge of the rights of appellee, or under such circumstances as would put him upon inquiry in respect of such right, is conceded. If it were not, it would require the citation of no authority to sustain the position, that without proof of such notice, or that which would amount to notice thereof, appellee would not be entitled to the relief sought. The only proof in the record which we have been able to find, aside from the presumption arising from the possession of the respective tracts, tending to sustain this view, is that of appellee, who says: "Speaking from my own knowledge, Yeck was aware of my possession of the forty on section 35, and of George A.'s possession of the forty on section 26, from and after the date of my deed to George A. Crum." On the other hand, appellant, after testifying to an examination of the record, says: "All the knowledge I have concerning the title of George A. Crum to the land, is what he told me at the time he wanted the \$1000 from me. I asked him in what way he would secure me. He told me he would give me a mortgage on forty acres of land he bought from Doc. Crum, the complainant in this case. I asked him if there was any encumbrance on the forty. He said there was a mortgage of \$1000, payable to William Epler, that became due May 12, and that he wanted to pay that off; that he would give me a lien on the same piece of land. He said that he had bought this same piece of land from Doc. Crum two years before. * * * At the time I took this note and mortgage, I had no personal knowledge as to the locality of this forty acres of land. I have a general knowledge of the neighborhood in

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which this land is situated, and I felt satisfied that any forty acres in that neighborhood was good security for \$1000. * * * I had no knowledge of the description of the land as to where the complainant at that time lived,—that is, on what forty."

It may very well be that appellant knew where each of the Crums resided, without knowing or having his attention in any way called to the description of the tract upon which each lived. This would very naturally be so, unless he had a very intimate knowledge of the land by its numbers, which is not shown. We are not prepared to hold that the preponderance of the evidence in respect to this matter is with appellee. It is clearly shown that appellant, before taking the security, examined the record, and found that George A. Crum had a deed from George W. Crum, appellee, and apparently a good title to the land described in the mortgage. We can find no sufficient evidence in this record upon which to base the presumption that he knew as a fact, when he took his mortgage, that it was upon the land of appellee, nor is there anything in the record, aside from the possession by appellee of the tract mortgaged, that would put a reasonable and prudent man upon inquiry as to the state of the title. It may be conceded that appellant knew where appellee and George A. Crum, respectively, lived, and that when George A. Crum proposed to give him a mortgage on the land which he had bought of George W. Crum, and had mortgaged to Epler, and when he examined the records and found there a deed from George W. Crum to George A. Crum, and a mortgage from George A. to Epler, upon the forty-acre tract in section 35, he supposed that it was the land occupied by George A. Crum; but that would only prove that he was mistaken in the locality of the land he was getting the mortgage upon, and not in its description. The evidence does not disclose that he was told where the land was located or who was in possession of it. Nor do we think that appellant was negligent in not making further inquiry. He was told, simply, that he was to have a mortgage

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on the land that had been mortgaged to Epler, and which had been conveyed by appellee to said George A. Crum. With this information he went to the record, and found the land mortgaged to Epler, and conveyed by appellee to George A., was the north-east quarter of the south-east quarter of section 35, and took his mortgage accordingly. He made all necessary examination and inquiry he was bound to make, and all, it seems to us, that any reasonable and prudent man would make under the circumstances, and there was nothing apparent to apprise him of any mistake in the description. If George A. Crum had claimed title through a source other than George W. Crum, then the possession of the latter might have been notice to appellant sufficient to have put him upon inquiry as to the rights of the said George W. Crum in the land. But under the facts in this case, such possession by the said George W., if known to the appellant, would put appellant on inquiry as to title claimed by the said George W., acquired by him after the date of his deed to George A. only, and it is not pretended there was any such title acquired. The mistake in this case was the result of negligence on the part of appellee, for which appellant is in nowise responsible. Appellee had it in his power to correct the mistake, so that no injustice would have been done.

It is apparent that Skiles, by the exercise of proper diligence, could, at the time of the discovery of the mistake, have protected himself from loss. But if he could not, it is apparent that, at the time of his purchase, if he had examined the record, it would have been disclosed to him that the title to the forty on section 26 was in appellee, and that George A. Crum had no title of record thereto, and could convey no title. The slightest inquiry or diligence on his part would have apprised him that it would be unsafe to purchase the forty on section 26 of the said George A., and rely upon any title the said George A. then had thereto. If, however, he chose to buy of said George A., relying on his possession and his equitable title, he would

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be held to take the title thus acquired, charged with all the equities to which it was subject in the hands of his grantor, one of which was the equitable right of appellant to attach his mortgage to the land. Upon a bill filed by either Skiles or said George A., to correct the mistake in the deed to said George A., they would have been compelled to do equity.

There are two familiar principles, either one of which, in the view we take of this case, is sufficient to preclude appellee from obtaining the relief sought by his bill. It is a fundamental doctrine of equity, that where one of two innocent persons must suffer by the fraud of a third person, the loss must fall upon him who, by his conduct, put it in the power of such third person to cause the injury. By his mistake in the first deed to George A. Crum, appellee vested in him the legal title, and put it in the power of said George A. to convey the legal title to the tract on section 35, and invested him with the muniment of title thereto, and by correcting that mistake after he had notice of appellant's mortgage, and equitable right of satisfaction thereof out of the forty on section 26, appellee put it in the power of George A. Crum to commit, and assisted him in consummating, an act by which either appellant or appellee must be the loser, and, according to the principle announced, the loss must fall upon appellee. When appellee discovered the mistake of his own making, he also discovered the equitable right of appellant, and had it in his power, and it was his duty, under his agreement with appellant, in correcting the mistake, to see that the rights of appellant were protected.

It requires no citation of authority to sustain the principle announced, or that other principle, also fundamental, that he who seeks equity must do equity, or to show the applicability of these principles to the facts of this case. Undoubtedly a court of equity would, upon proper bill filed by appellee, have corrected the mistake and transferred appellant's mortgage, and declared it to be a lien on the land in section 26, or, at

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least, have decreed that appellee have a conveyance from George A. of the tract in section 35; and created a lien in favor of appellant upon said tract in section 26 for the amount of his mortgage. Appellee, however, chose to correct the mistake without protecting appellant and without notice to him, after his agreement that he would not make the corrections without the payment of appellant's mortgage, and upon which agreement he must have known appellant relied. Under such circumstances, we are of opinion that he has no standing in a court of conscience.

It may be said that appellant could have filed a bill and enforced his equitable rights, and because he did not do so he is guilty of *laches*, and must suffer the consequence. The answer to this is, that appellee expressly promised that he would hold the title to the land on section 26, and make no correction of his former deed until appellant's debt was satisfied. Upon this promise appellant had a right to, and evidently did, rely.

To affirm this judgment would be to cause appellant, who has acted, so far as we can see, in the most perfect good faith, and without negligence, unless it was in relying on the assurance and promise of appellee, to lose his security,—in the taking of which, as we have seen, he acted in good faith and with proper care,—and permit appellee to escape loss which has been caused by his own negligence in the first instance, followed by his own deliberate act of putting it in the power of George A. Crum to convey the tract on section 26 to innocent purchasers without notice of appellant's right. This would be most inequitable, and to it we can not yield our consent.

The judgment of the Appellate Court and the decree of the circuit court will therefore be reversed, and the cause remanded to the circuit court of Cass county, with instructions to render a decree dismissing complainant's bill.

Judgment reversed.

Syllabus. Opinion of the Court.

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EZEKIEL C. HOWELL

v.

WILLIAM W. FOSTER.

Filed at Springfield September 27, 1887.

1. PARTIES—*in chancery—generally.* In equity, all persons materially interested in the subject matter of the suit, and who will be directly affected by the decree sought, must be joined as parties, either as complainants or defendants.

2. SAME—*on bill by purchaser of land to enjoin sale under execution against a former owner.* On bill by a purchaser of land from a judgment debtor, to enjoin the sheriff from selling such land under executions against the former owner, on the ground that the judgments had ceased to be a lien on the land by lapse of time, in order to the proper presentation of that question the plaintiffs in the executions are necessary parties.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Macon county; the Hon. JAMES F. HUGHES, Judge, presiding.

Mr. H. PASCO, and Mr. B. I. STERRETT, for the plaintiff in error.

Messrs. OUTEN & VAIL, for the defendant in error.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

The present writ of error brings before us for review a judgment of the Appellate Court for the Third District, affirming an order and decree of the circuit court of Macon county, dismissing a bill in equity filed therein by Ezekiel Howell, against William Foster, the sheriff of the county, to restrain him from selling certain real estate belonging to the former, under numerous fee-bills and executions then in his hands in favor of various parties, and for divers small sums of money, amounting, in the aggregate, to over \$500.

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The bill charges, "that on the 25th of February, March 3, and March 9, 1886, one Frederick Aholtz, deceased, by warranty and quitclaim, and for a valuable consideration by your orator to him paid, deeded and conveyed to your orator all and each and every part and parcel of the property hereinafter mentioned and described, then owned or claimed by the said Aholtz, situated in Macon county, Illinois; that said deeds of conveyance are on record in said county of Macon; that prior to the time of making such conveyances by said Aholtz to your orator, to-wit, at the times hereinafter by the proceedings shown, divers judgments for costs were rendered against the said Aholtz in the circuit court of Macon county. All of the said judgments, or nearly all of them, were over seven years old at the time said conveyances were made by the said Aholtz to your orator, and said judgments, or nearly all of them, were over seven years old at the time the divers executions or fee-bills were issued on the same, as herein complained of, all of which judgments, executions or fee-bills, and the levies by the sheriff made thereby, together with the different pieces of property thereon levied, are hereinafter fully described and set forth; that by reason of the lapse of time, to-wit, more than seven years, the said judgments had all, or nearly all, become stale, and ceased to be liens on said real estate, or any part thereof, by reason of limitation, as aforesaid, prior to the time such fee-bills or executions were issued and said conveyances made by Aholtz to your orator; that on or about December 24, 1885, about eighteen fee-bills or executions were issued, and placed in the hands of the sheriff of Macon county, Illinois, on said stale judgments, for costs, against said Aholtz, and levied March 16, 1886, on said lands." The bill then sets out a detailed statement of the dates and amounts of said judgments, and the names of the parties thereto; also, the dates of the executions and fee-bills, and a description of the lots and lands upon which they were respectively levied. From this statement it appears that twelve of the judgments were

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more than seven years old at the time said executions and fee-bills were issued thereon, while as to the others the full seven years had not run at the date of their issue, and as to some of them the seven years had not expired when they were levied.

Judging from the manner in which the case has been presented, the chief object of counsel in prosecuting the present writ of error is to obtain an expression of this court's opinion, upon the facts stated, as to the rights of the plaintiffs in said judgments to have the same, or some of them, satisfied out of the lands in question. As the complainant has brought no one before the court but the sheriff, a mere formal party, who has not the slightest interest in the subject matter of the suit or the questions sought to have decided, we do not feel at liberty, in the absence of the plaintiffs in said judgments, (the real parties in interest,) to consider or pass upon the proposed question. We the more readily adopt this course because it is not, in our view of the case, at all necessary to a decision of it. It is a fundamental principle of equitable pleadings, that all persons materially interested in the subject matter of the suit, and who will be directly affected by the decision to be rendered, must be joined as parties, either plaintiffs or defendants. *High on Injunctions*, sec. 752; 1 Daniell's Ch. Pr. (Perkin's ed.) 240; *Smith v. Rotan*, 44 Ill. 506; *Lynch v. Rotan*, 39 id. 14.

That the bill in the present case is fatally defective in not making the plaintiffs in said judgments parties defendant, is, upon the authorities, quite clear, and it therefore follows that the circuit court ruled properly in sustaining the demurrer to it. If the plaintiff, upon the demurrer being sustained to the bill, still desired to have the questions now discussed passed upon by this court, he should have taken leave to amend the bill. Instead of that he elected to stand by it, thus leaving the court no choice but to dismiss the bill, as it did.

The judgment will be affirmed.

Judgment affirmed.

Syllabus.

THE SANGAMON COAL MINING COMPANY

v.

WILLIAM WIGGERHAUS.

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122	279
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Filed at Springfield September 27, 1887.

1. **MINES AND MINING**—*providing signals and places of refuge—the statute construed.* Section 8, of chapter 93, of the Revised Statutes, entitled "Miners," that "all underground, self-acting or engine planes or gangways on which coal cars are drawn and persons travel, shall be provided with some proper means of signaling between the stopping places and the end of said planes or gangways, and sufficient places of refuge at the sides of such planes or gangways shall be provided at intervals of not more than twenty feet apart," applies to all underground, self-acting or engine planes, and also to all underground gangways on which coal cars are drawn and persons travel, whatever the motive power may be.

2. **SAME—the rule of negligence—as at common law.** In an action on the case by a miner, to recover for a personal injury while working in a coal mine, the court instructed the jury, that if the defendant company knowingly, negligently, etc., failed to keep its doors across its gangways, and the gangways themselves, in reasonably safe condition and repair, and by reason thereof the plaintiff was injured, as alleged, they should find for the plaintiff: *Held*, that the instruction was proper, as laying down the rule of liability for negligence at the common law, and did not attempt to lay down the rule under the statute.

3. **NOTICE to an agent—as notice to the principal—in the case of corporations.** When a duty is imposed upon and intrusted to an agent by a corporation, notice to such agent of matters falling within his line of duty is notice to the corporation.

4. **APPEALS—finding of facts by Appellate Court.** Where the Appellate Court renders a general judgment of affirmance of a judgment in favor of the plaintiff in an action on the case for negligence, without a finding of the facts, this will amount to a finding of each fact necessary to the right of recovery, and this court will presume that the evidence sustains the declaration.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Brief for the Appellant.

Messrs. PATTON & HAMILTON, for the appellant:

While this court will not review controverted questions of fact when passed upon by the Appellate Court, and reverse because of error as to such questions, we understand the evidence in the record will be considered, first, where it is insisted the trial court erred in excluding or admitting evidence; second, where the evidence, conceding all it shows or tends to show, fails to show a right of recovery; and third, where there is no evidence tending to prove a proposition upon which instructions to the jury were given. *Railroad Co. v. Thompson*, 116 Ill. 159; *Beard v. Maxwell*, 113 id. 440; *Furnace Co. v. Abend*, 107 id. 44.

To recover in this case, the plaintiff must establish that the place where he was hurt was an "underground, self-acting or engine plane, or gangway, on which cars were drawn and persons traveled," and that the defendant willfully neglected to "provide sufficient places of refuge at the sides of said plane or gangway, at intervals of not less than twenty feet apart," and that by reason of such willful neglect or omission, the plaintiff, whilst in the exercise of due care and caution, was injured.

The omission of appellant to provide sufficient places of refuge, etc., if the mine was operated by "self-acting or engine planes or gangways," must have been willful. Rev. Stat. sec. 14, chap. 93; *Beard v. Skelton*, 13 Bradw. 54; *Hawley v. Daily*, id. 391.

The first of plaintiff's instructions is erroneous, in entirely ignoring the element of willfulness on the part of appellant. *Hawley v. Daily*, 13 Bradw. 391.

The second is objectionable for the same reason, and as ignoring the material question whether the injury was the result of the door being out of repair.

The third is based upon the theory that the defendant used an underground gangway for the transit of servants, and on which cars were drawn, and that it was its duty to provide

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places of refuge, not more than twenty feet apart. It was not based on any evidence, as there was no proof that the gangways were used for the transit of its servants, or that they were such as the statute refers to.

The fourth is faulty in stating that notice to an agent, whose duty it was to fix the door, was notice to the principal; that the opening of the door was hard and difficult. The plaintiff can not recover for the negligence of a fellow-servant. *Railway Co. v. Moranda*, 93 Ill. 302; *Railroad Co. v. Geary*, 110 id. 383; *Stafford v. Railroad Co.* 114 id. 244.

Messrs. ORENDOFF & PATTON, and Mr. JAMES E. DOWLING, for the appellee.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

This was an action brought by appellee in the Sangamon circuit court, to recover for personal injuries received by him while in the employ of appellant. A trial resulted in a verdict and judgment thereon for the plaintiff, which, on appeal to the Appellate Court for the Third District, was affirmed, and the case is brought to this court by the further appeal of the defendant below.

The Appellate Court having rendered a general judgment of affirmance, without a finding of facts, it must have found each fact necessary to the maintenance of plaintiff's case in favor of the plaintiff and against appellant. We are not, therefore, required to examine the facts proved, for the purpose of determining whether they have been correctly determined, but must presume that the evidence sustains the declaration; and it having been admitted by pleading to the declaration, and now conceded here, that the several counts of the declaration state a good cause of action, it must, in the absence of any legal question being raised as to the sufficiency of the proofs, be held to establish the plaintiff's right of recovery upon some one or more of the counts of his declaration.

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The first count, after alleging that appellant was operating its mine, avers it had underground planes and gangways in said mine, with doors in and across the same at intervals, on which coal cars were drawn and persons traveled, and averring it was the duty of appellant to provide, at intervals of not more than twenty feet apart, sufficient places of refuge at the sides of said underground planes and gangways, and that appellant, willfully, wrongfully and negligently disregarding its duty, failed to provide the same; that the plaintiff was engaged in loading cars in said mine and in placing empty cars in position to be loaded, and that while he, with all due care and diligence, in discharge of his duty, was passing on said underground gangway of appellant in said mine, leading to the shaft thereof, certain loaded cars were being drawn on said underground gangway toward the shaft in front of him, when they broke loose and became detached from the power by which they were being moved, at a point where they were going up an incline in said gangway, and ran rapidly down the same, and by reason of the failure of appellant to provide such sufficient places of refuge, appellee was unable to escape on either side of the track, and he was, in consequence, struck by said cars and injured, etc. The second count alleges, substantially, the same matter, but with the further allegation, that it was the duty of appellant to keep the doors across the track in repair, so that persons passing along the gangway could readily open and escape through them, and breach, etc.; and that appellee, while in discharge of his duty, with due care, was passing on said gangway, was unable to open a door across the same or pass through it, whereby he was unable to escape, and was injured by the cars, as in the first count stated. The third count alleges that it was the duty of appellant to provide and keep sufficient space on the sides of its underground planes or gangways free of obstruction, so that persons on the same could step aside and avoid injury, etc.,

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and that by reason of failure, etc., of appellant in that respect, he was injured, etc.

The first count is predicated upon section 8, of chapter 93, of the statute entitled "Miners," which requires that "all underground, self-acting or engine planes or gangways on which coal cars are drawn and persons travel, shall be provided with some proper means of signaling between the stopping places and the end of said planes or gangways; and sufficient places of refuge at the sides of such planes or gangways shall be provided, at intervals of not more than twenty feet apart."

It is insisted that the statute in question applies only to self-acting planes or gangways, or to those operated by means of an engine, and has no application to mines where, as in this instance, the motive power by which the cars are hauled is that of a mule or horse. We are not prepared to give the language employed so narrow a construction. The intent of the legislature undoubtedly was to afford protection to the operative in mines, and while accidents from the moving of loaded cars underground may not be as frequent when machinery is not employed as when it is, still, the necessity for protection by proper safeguards existed. The statute applies, it is conceded, to all "underground, self-acting or engine planes," and it is there required that places of refuge should be provided. It will be observed that it by no means follows, necessarily, that the word "self-acting" or "engine" qualifies the word "gangways." A self-acting plane upon which cars are moved, has a well understood meaning, as applied to those mines so circumstanced that the loaded cars, by reason of the dip of the plane toward the shaft, will move without other motive power down the incline and deliver themselves at the pit; and in some instances, by means of endless cables working around drums, the momentum of the descending loads will deliver the empty cars back to the face of the mine, or to some convenient or accessible point, to be re-loaded. An under-

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ground engine plane on which coal cars are drawn, would be understood as a plane where the motive power was that of a steam engine, communicating the motion to the cars by means of appliances adapted for that purpose; and each of these terms would have a technical meaning, as applied to the particular subject under consideration. A "gangway" is defined by Webster as "a passage-way or avenue into or out of any inclosed place." This record fails to show that the word has, as applied to mines or the entries or passage-ways therein, however used, any other than this general signification, nor have we, by consulting the standards, been able to find it used in any other manner, except in nautical phrase it is used to designate a particular part of a vessel. Thus we find the legislature employing language descriptive of known and defined objects and methods, and then using a word including any passage or way or avenue leading from the mine to the pit, through or along which coal cars are drawn and persons travel.

Giving effect to the intent of the legislature as thus expressed, we are of opinion that the clause applies to all underground, self-acting or engine planes, and also to all underground gangways on which coal cars are drawn and persons travel, whatever the motive power may be, and hence was applicable to the mine of appellant; and the court did not err in so instructing the jury.

It is next urged that the court erred in giving the first, second, third and fourth instructions for appellee. What has already been said disposes with sufficient clearness of the objections urged as to the third.

The criticism of the first instruction, when it is considered as to the case made under the second and third counts of the declaration, does not exist. It told the jury that if the defendant knowingly and negligently, etc., failed to keep its doors across its gangways, and the gangways themselves, in reasonably safe condition and repair, and that by reason thereof the plaintiff, while exercising proper care, etc., was injured, as

Opinion of the Court.

alleged, etc., they should find for plaintiff, ignoring, as is said, the element of willfulness. The criticism arises solely from the misapprehension of counsel that the instruction relates to plaintiff's case as made under the first count of the declaration, for not providing the places of refuge required by the statute. It did not pretend to lay down the rule under the statute, but at common law, for negligently failing to keep the door and gangway in suitable repair, and, as applicable thereto, stated the rule of law correctly.

The same objection is urged, under a like misapprehension, to the second of plaintiff's instructions, and also the further objection that it fails to require the jury to find that the injury to plaintiff was the effect of the negligent failure of appellant to keep the door across the gangway in repair. This criticism arises from the fact that the instruction is incorrectly given in the abstract, the words as found in the record, "and that thereby the plaintiff received injury while engaged" in the performance of his duty as such servant, being omitted. It is apparent, when read in the record, it is not obnoxious to the objections made.

The fourth instruction informed the jury, that if they believed, from the evidence, that an agent of the defendant whose duty it was to fix said door or cause the same to be fixed, was notified that the opening of the door across the gangway was difficult and hard, then such notice was notice to defendant, etc. It is insisted that notice to a co-servant of appellee is not notice to the common employer. We do not think it important to discuss the doctrine indicated by the objection urged. It is, we think, sufficient to say, that when a duty is imposed upon and intrusted to an agent by a corporation, notice to such agent of matters falling within his line of duty, is notice to the corporation. The instruction, we think, stated the rule correctly.

There was evidence tending to sustain the plaintiff's case. The court fully laid down the rules of law in an elaborate and

Syllabus. Brief for the Appellant.

well prepared series of instructions presented by counsel for appellant, and it is, we think, impossible that the jury were misled as to the law applicable to the facts.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

FREDERICK AHOLTZ

v.

JAMES H. DURFEE *et al.*

Filed at Springfield September 27, 1887.

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1. BILL OF REVIEW—*requisites of the bill.* Where a bill is brought to review a former decree, it is necessary to set out the bill, answer and decree in the former proceeding. A mere skeleton of the record to be reviewed will not suffice. The bill should also show the point in which the party filing it feels himself aggrieved, but need not state the evidence in the former case.

2. SAME—for *newly discovered evidence.* In order to sustain a bill of review for newly discovered evidence, the new evidence must be of an important and decisive character, and must not be merely cumulative. If it is merely cumulative, and not decisive in its character, the bill will not lie.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Macon county; the Hon. C. B. SMITH, Judge, presiding.

Mr. H. PASCO, and Mr. B. I. STERRETT, for the appellant:

In this case, it is alleged in the bill that the witness Coon will corroborate appellant, and that his evidence will, or would, probably have produced a different result, and that it was not the fault of appellant that the evidence of said Coon was not produced on the trial; that he could not produce it, as he did not know of it until after trial and decree, and adjournment of court; that this evidence is material, and would, and will, produce a different result. All of this is admitted by the demurrer. In such cases appellant insists that he should have

Brief for the Appellees. Opinion of the Court.

had and should have a new trial. *Wilder v. Greenlee*, 49 Ill. 253; *Railroad Co. v. Schumacker*, 77 id. 583; *Boyden v. Reed*, 55 id. 458; *Holmes v. Statler*, 57 id. 209; Story's Eq. Pl. (8th. ed.) sec. 413.

Messrs. OUTEN & VAIL, for the appellees:

Leave of court is necessary to the filing of such a bill, and will not be granted without an affidavit that the new matter could not be produced by the party in the original cause. Story's Eq. Pl. secs. 412-415.

The former bill, and the proceedings under it, must be stated; the decree, and the point in which the party exhibiting the bill conceives himself aggrieved by it, and the ground of law upon which he seeks to impeach, or, if it be brought upon newly discovered evidence, the evidence must be stated. *Griggs v. Gear*, 3 Gilm. 2; *Gardner v. Emerson*, 40 Ill. 296; *Walker v. Douglass*, 89 id. 425; *Goodrich v. Thompson*, 88 id. 206; 3 Daniell's Ch. Pr. 1728; Adams' Eq. 879, 880.

The new evidence must not be merely cumulative, but must be of an important and decisive character, if not conclusive. *Griggs v. Gear*, 3 Gilm. 2; *Garrett v. Moss*, 22 Ill. 363; *Turner v. Berry*, 3 Gilm. 554; *Judson v. Stephens*, 75 Ill. 255.

The same rule applies as in motions for new trial at law. The newly discovered evidence should be supported by affidavits of the witnesses proposed to testify. *Fuller v. Little*, 69 Ill. 229; *Cowen v. Smith*, 35 id. 416; *Yates v. Monroe*, 13 id. 212.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in chancery to review a former decree of the circuit court of Macon county, rendered in a certain cause between the same parties. The defendants interposed a demurrer to the bill, which the court sustained, and the bill was dismissed. The complainant appealed, and the question to be determined is as to the sufficiency of the bill.

Opinion of the Court.

It is alleged in the bill, that the complainant is the owner of a certain lot in Decatur; that on the 26th day of June, 1877, the lot was sold for the taxes due thereon for the year 1876; that B. D. Durfee purchased the lot, and assigned his tax certificate to James H. Durfee, who subsequently obtained a deed for the lot; that in May, 1881, Durfee brought an action of ejectment to recover possession of the lot; that at the May term of the Macon circuit court, on the 27th day of the month, he recovered a judgment against the complainant for the possession of the lot; that on the 23d day of June complainant entered a motion for a new trial, which was allowed, on condition that complainant pay all costs within one year; that complainant, during the year, called several times at the office of the clerk of the court, with the money to pay the costs, but each time the clerk informed him that the costs were not made up, and the files had been taken out of his office, and he could not make up the costs until the papers were returned; that the files remained out of the clerk's office until the year expired; that in the absence of the files the clerk was unable to compute the costs, and he so informed the complainant. It is also alleged that on the 2d day of December, 1882, complainant paid the costs, but the court then refused a new trial; that Durfee made an effort to have the sheriff of Macon county put him in possession of the lot, and thereupon complainant filed his bill in equity, in the circuit court, against said Durfee and the sheriff, and asked an injunction, and prayed for a decree setting aside said tax deed, and offering to pay the amount paid out by said Durfee, and whatever additional amount the court might order, to allow him to redeem said premises, setting up the fact that he had tried to pay the costs, and that he was not guilty of negligence in reference thereto, and that the affidavit made by said Durfee, to obtain a tax deed, was void, for the reason it did not show when, where or how he had served the notice to redeem on appellant, and did not say whether he had served it personally.

Opinion of the Court.

or by copy or by publication, and upon filing said bill, an injunction was granted, restraining the execution of the said writ of possession, and said defendant appeared and filed a demurrer to said bill, which demurrer was overruled, and thereupon the defendant filed answer, and the issues were made up, and said cause was, by the court, referred to the master in chancery to take proof, and make report, etc.; that in said cause, Durfee and his counsel admitted that the tax deed and affidavit were void, but made their sole defence that appellant had been guilty of willful negligence in not paying the costs in the ejectment suit within the year,—and this was the only material question tried in that case; that the evidence was taken before the master, and appellant then testified that he had gone to the office of said clerk in order to pay the costs, and the clerk testified for defendant and denied that appellant so applied to him; and appellant being then unable to corroborate himself, and knowing of no other than himself by whom he could make proof of that fact, said cause was heard by the court, on the evidence of appellant testifying, and the clerk denying the same; and there being no preponderance of evidence, the court, at the May term, 1885, to-wit, on June 5, 1885, dissolved said injunction, and dismissed said bill. It is then alleged that a writ for the possession of the property was placed in the hands of the sheriff, who is threatening to execute the same, and will do so unless restrained. The bill also states, that soon after said last named cause was decided, he, for the first time, learned the fact to be, that from March 13, 1882, to about September 1, 1882, one Lewis H. Coon, an attorney-at-law of Fort Scott, Kansas, who formerly resided in Decatur, Illinois, and was engaged in the office of said clerk, recording deeds, etc., and was there at work in the clerk's office at the time when appellant was calling, from time to time, on the said clerk, to ascertain the amount of costs in said ejectment suit, and saw appellant call and heard appellant talk to said clerk, and also said Coon himself talked with

Opinion of the Court.

said clerk in reference thereto, and also talked with said defendant, Durfee, in reference to said matter; that appellant could, in many respects, prove by said Coon what he himself testified to in reference to his attempts to pay said costs, and disprove by him the statements of said clerk in reference thereto. The complainant also alleges that he has received a letter from Coon, which contains a statement of what he knows in regard to the matter in dispute, which is made an exhibit to the bill; that had appellant known that he could make proof by said Coon, before the said last named cause was disposed of, he would have procured his testimony, and could and would have obtained a decree in his favor, but he knew nothing of such evidence until about June 26, 1885; that he expects to procure, and will procure, the evidence of said Coon, and avers that if he had known said Coon knew anything, he would have procured his testimony at said former trial, in said court, at the May term, 1885; and if he should have had Coon, or any other person, to corroborate him on the subject of paying the costs, or trying to pay, that the court would probably have decided said cause in favor of him.

The bill contains other allegations, but enough have been set out to show its scope and object. The bill contains a prayer for process, and for an injunction to restrain the execution of the writ of possession, for a new trial in the action of ejectment, that the tax title be set aside, and that the court find the amount complainant should pay Durfee, that he be permitted to take the evidence of Coon, and for general relief.

It is plain, from the bill, that the same question presented by this bill was litigated between the same parties in a former chancery proceeding. In the former case, there was a bill, answer, replication, proofs, a hearing, and a final decree against the complainant. It is not alleged in the bill that there are errors in the record of the former proceeding, or that the decree was obtained by fraud, but the *gist* of the bill is, that since the former decree the complainant has found a new wit-

Opinion of the Court:

ness, by whom he expects to corroborate his own testimony taken on the former hearing. In substance, it is alleged that the former chancery case turned on the question whether the complainant had made an effort to pay to the clerk of the circuit court of Macon county, within a certain time, certain costs; that upon that point complainant testified that he did offer to pay the costs, and that the clerk testified that he did not, and there being no preponderance, the court decided against complainant; that since the decision, complainant has discovered a witness, named Coon, who will corroborate complainant's evidence.

There are several fatal objections to the bill. A bill of review may be filed, in a proper case, upon newly discovered evidence, and this bill is pretended to be predicated upon that ground; but a brief reference to a few elementary principles will suffice to show that the allegations of the bill are not sufficient.

Where a bill is brought to review a former decree, it is necessary to set out the bill, answer and decree in the former proceeding. A mere skeleton of the record to be reviewed will not suffice. In Story's Eq. Pl. sec. 420, in speaking of the form of a bill of review, the author says: "In a bill of this nature, it is necessary to state the former bill and the proceedings therein, the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it." This court has announced substantially the same rule in a number of cases. *Gardner v. Emerson*, 40 Ill. 297; *Judson v. Stephens*, 75 id. 259; *Goodrich v. Thompson*, 88 id. 207; *Turner v. Berry*, 3 Gilm. 544. In the case last cited it is said: "From the very nature of the proceedings it is manifestly necessary to state all the proceedings in the original cause, except the evidence on which the court found the facts on which it proceeded to render the decree." In the *Emerson* case the same doctrine is declared, and it is also held, that where the bill is brought on newly discovered evidence, the

Opinion of the Court.

evidence must be stated. In this bill we find a mere skeleton of the proceedings in the former case. Neither the bill, answer nor decree is given. Under the authorities cited, if the bill was sufficient in other respects, the defect named would be fatal.

There is, however, another fatal defect in the bill. In order to sustain a bill of review for newly discovered evidence, the evidence must be of an important and decisive character, and must not be cumulative. In *Griggs v. Gear*, 3 Gilm. 10, in discussing this question, it is said: "The bill must set forth the newly discovered matter. The evidence must not be cumulative, and must be of an important and decisive character." From the allegations of complainant's bill, it is plain that the evidence of Coon is cumulative, and it is not of a decisive character.

The letter of the proposed witness, Coon, in regard to what his testimony might be as to complainant's efforts to pay the costs, is made an exhibit in the bill. In the letter is the following: "What was said by Fred to the clerk about this matter, or what the clerk said to Fred about it, I can not state. In a short time after this, Fred came into the office alone, and had some talk with the clerk about these costs; but what was said by Fred, or whether he offered to make the payment, I am unable to state." This evidence can not be regarded as decisive. Had it been introduced on the former trial it could add but little weight to that of the complainant, and in addition it is merely cumulative.

There are other objections to the bill, but we have pointed out enough to show that the demurrer was properly sustained.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Syllabus. Brief for the Appellant.

SEBASTIAN FIETSAM

122 293
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v.

JAMES M. HAY et al.

Filed at Mt. Vernon September 28, 1887.

1. FRANCHISE—defined. The word "franchise" is often used in the sense of privileges generally, but in its more appropriate and legal sense the term is confined to such rights and privileges as are conferred upon corporate bodies by legislative grant. It is nothing more than the right or privilege of being a corporation, and of doing such things, and such things only, as are authorized by the charter.

2. SAME—in whom vested. It follows, from the very nature of a corporation, that a franchise, or the right to be and act as an artificial body, is vested in the individuals who compose the corporation, and not in the corporation itself.

3. SAME—not the subject of sale or transfer. A corporation, in the absence of statutory authority, has no right or power to sell or transfer the franchise, or any property essential to its exercise, which it has acquired under the law of eminent domain.

4. CORPORATION—defined. A corporation aggregate is an artificial being created by law, and composed of individuals who subsist as a body politic, under a special denomination, with the capacity of perpetual succession, and of acting, within the scope of its charter, as a natural person. It has, for most purposes, a distinct identity from that of the individual corporators.

APPEAL from the Circuit Court of St. Clair county; the Hon. B. H. CANBY, Judge of the City Court of East St. Louis, Judge, presiding, at the request of the Hon. WILLIAM H. SNYDER.

Mr. F. A. McCONAUGHEY, for the appellant:

It is not proposed to argue this question. The authorities do not seem to be clear or uniform. Those which seem to support the position of the appellant are as follows: *Stewart v. Hargrove*, 23 Ala. 436; *Lewis v. Gainesville*, 7 id. 85; 3 Greenleaf's Cruise, chap. 3, secs. 20-22.

A number of cases holding *contra* are cited in notes to the texts, in Angell & Ames on Corp. sec. 191; Morawetz on Pri-

Opinion of the Court.

vate Corp. sec. 928. As far as the cases there cited, however, have been examined by counsel, the charters involved were other than banking corporations.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

The People's Bank of Belleville, incorporated under a special act of the legislature, approved and in force March 27, 1869, having become insolvent, on the 17th of April, 1878, made a general assignment of all its property and effects for the benefit of creditors. The assignee presented a petition to the county court of St. Clair county, at its March term, 1887, for leave to sell "all the rights, privileges, powers and immunities which were granted by the said act incorporating said bank." The judge of the county court being interested in the result of the proceeding, the venue was changed to the circuit court of St. Clair county, where, upon due consideration of the petition, that court entered an order dismissing the same. The present appeal is from the order of dismissal.

The correctness of the decision of the circuit court depends entirely upon whether the title to the franchise created and conferred by the bank charter passed as an asset of the bank, to the assignee, under the assignment. That its language is sufficiently comprehensive and adequate to pass the franchise to the assignee, if, as matter of law, the bank could transfer it at all, we have no doubt. This is not questioned. The question, therefore, is, whether a corporate franchise, in the absence of statutory authority, is in law capable of being assigned or transferred. Differently put, the question, as formulated by the parties themselves, is, "Did the franchise of the said bank pass with the deed of assignment to the assignee as a salable asset of the said bank?"

The word "franchise" is often used in the sense of privileges generally, but in its more appropriate and legal sense the term is confined to such rights and privileges as are conferred upon corporate bodies by legislative grant. It is in the latter sense,

Opinion of the Court.

alone, the word is now to be considered. The franchise proposed to be sold is a corporate franchise, and the artificial body or political entity to which it pertains is what is known to the law as an aggregate corporation. Such a corporation has been well defined to be, "an artificial being created by law, and composed of individuals who subsist as a body politic under a special denomination, with the capacity of perpetual succession, and of acting, within the scope of its charter, as a natural person." Now, a franchise is nothing more than the right or privilege of being a corporation, and of doing such things, and such things only, as are authorized by the corporation's charter. This right of a body of men to be and act as an artificial person, without, as a general rule, incurring individual responsibility, is declared by Blackstone to be "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject." (2 Blackstone, 37.) Such right or franchise is defined by Bouvier to be "a certain privilege conferred by grant from government, and vested in individuals." (1 Bouvier, 545.) Now, it is clear from these definitions, and from the very nature of a corporation, that a franchise, or the right to be and act as an artificial body, vests in the individuals who compose the corporation, and not in the corporation itself. This fact, we think, is not without significance in reaching a conclusion upon the main question to be determined, outside of the numerous authorities bearing directly on the subject.

It will be kept in mind that the corporate body, for purposes of ownership, and, indeed, for most purposes, has a distinct identity from that of the individual corporators. The latter may be wealthy, when at the same time the former is insolvent, and *vice versa*. The corporation has no right to appropriate, sell, or otherwise dispose of any of the property or effects of a corporator. The relation of debtor and creditor may subsist between them in the same manner as between the company and other persons. The company's entire prop-

Opinion of the Court.

erty may be swept away from it by sequestration, or other means, and yet its franchises will remain vested in the corporators until they are either abandoned or forfeited to the State. All these propositions are familiar to the courts and the profession, and are well sustained by authority.

If, then, the franchise is vested in and belongs to the corporators, and not to the corporation itself, how could the latter transfer or assign it to another? On the plainest of principles this could not be done without legislative authority for that purpose, and we find nothing, either in the statute or the company's charter, conferring such authority. While it is conceded the legislature might confer on the artificial body the power to sell or assign the franchise to strangers, yet this would be, in effect, to authorize it to commit a species of suicide, for it is manifest the corporation could not exist a moment after the franchise conferred upon its members had been transferred to others. Indeed, when we consider the attributes and essential elements of corporate existence, resulting from the grant of the franchise, and without which the artificial body could not accomplish the objects of its creation or perform the duties imposed upon it by law, the sale or assignment of the franchise without special legislative authority would seem to be wholly inadmissible. It is proposed here, it will be noted, to sell simply the franchise of the bank. Assuming this can be done, the question arises, what would be the effect of such a sale? It clearly could not have the effect of making the purchasers, if more than one, an aggregate corporation, with the general banking powers conferred by the bank charter. To assert such a proposition would be simply startling; and yet, if in such case the purchasers would take anything at all, they certainly could not take less than the right to be a banking corporation, with all the powers and privileges conferred by the charter for these rights,—are of the very essence of the franchise; and consequently, the one could not be thus acquired without, by the same act, securing the others,—a view

Syllabus.

which, as already indicated, has no sanction in reason or authority.

While statements are to be found on this subject in some of the text books, as well as in some of the decided cases, which can not be reconciled with the conclusion we have reached, yet we are clearly of opinion that a corporation, in the absence of statutory authority, has no right to sell or transfer its franchise, or any property essential to its exercise, which it has acquired under the law of eminent domain. This proposition, in our judgment, is sustained both by reason and the decided weight of authority. *Black et al. v. Delaware and Raritan Canal Co.* 24 N. J. Eq. 455; *Freeman on Executions*, secs. 179, 180; *Pearce on Railroads*, 496-1; *Jones on Mortgages*, sec. 161; *Rorer on Judicial Sales*, (2d ed.) 222; *Archer v. Terre Haute and Indianapolis Railroad Co.* 102 Ill. 493; *Bruffett v. Great Western Railroad Co.* 25 id. 353; *Chicago and Rock Island Railroad Co. v. Whipple*, 22 id. 105; *Ottawa, Oswego and Fox River Valley Railroad Co. v. Black*, 79 id. 262.

The circuit court having reached this conclusion, its order and judgment will be affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* Charles Gerstkemper

v.

LOTS IN ASHLEY.

Filed at Mt. Vernon September 28, 1887.

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1. TAXATION—*assessment—by whom—and herein, of the power of review.* The assessor, alone, is the person or officer who can, in the first instance, determine the value of property for taxation; and no appeal to or right of review by any tribunal, other than the boards mentioned in the statute, is given.

2. The courts are powerless to revise an assessment or change or set aside a valuation of property made by an assessor, or by the boards authorized by law to review the same, where the assessment has been honestly

Statement of the case.

made upon property subject to taxation, and upon the proper basis. Such assessment can not be impeached or set aside except for fraud or want of jurisdiction of the property. The courts will not interfere on the ground that the assessor erred in judgment by assessing too high or too low, if he acted honestly.

3. Where a deputy assessor views the property, and sets down, in the proper column, its fair cash value as determined by him, it can make no difference that he supposed his work was subject to review by some one else, or that his assessment would be reduced one-third in amount; and his statement to the owners that such reduction would be made, affords no valid reason for their not appearing before the board of review and seeking a reduction of the valuation.

4. A county board is powerless to change the assessments returned according to law, except upon complaint that they are too high or too low, or by way of equalization under the statute.

5. *SAME—inequality in assessment—as affecting the validity of the tax.* The law requires all taxable property to be assessed at its fair cash value, and the fact that some property may be assessed at only one-third that value will not render invalid an assessment of other property at its cash value.

6. So the omission of the assessor to assess the property of some persons liable to taxation, or the assessing of the property of some at less than its fair cash value and that of others at its cash value, while it may cause the tax-payer whose property is assessed at its cash value to bear an undue portion of the public burden, it will not affect the validity of his tax.

7. *SAME—fraud in assessment—to invalidate tax.* The fraud which will authorize the courts to interfere and declare an assessment void, is such as affects the assessment itself. The statement of the assessor, to those assessed, that his valuation will be reduced to one-third of the fair cash valuation made by him, is not such a fraud as will authorize the court to interfere, and will not excuse the tax-payer from seeking redress before the proper board of review.

APEAL from the County Court of Washington county; the Hon. GEORGE VERNER, Judge, presiding.

This was an application to the county court of Washington county, for judgment for taxes against certain lands and lots returned delinquent by the collector of that county. Objections were filed by John L. Sargent and others, as follows:

"Comes John L. Sargent, and files objections to judgment being rendered against lots 18 and 19, block 6, Ashley; and

Statement of the case.

for special objection says, excess in assessment: lot 18 assessed at \$25, lot 19 assessed at \$300, when lot 18 should have been assessed at \$12, and lot 19 should have been assessed at \$125.

May 17, 1886.

JOHN L. SARGENT."

Objections of M. Kerstine and twenty-six other tax-payers, as follows:

"STATE OF ILLINOIS, } ss. In County Court, May term, 1886.
Washington county, }
"In matter of application for judgment against delinquent lands
and lots:

"Now come the undersigned owners of real estate hereinafter described, limiting their appearance for that purpose, and resist application for following reasons: First, because no sufficient notice of application; second, because valuation of real estate being unjust, erroneous and excessive in the extreme, and the said owners were induced not to appear before the county board to have assessment corrected, by false and fraudulent statements of the assessor that he was assessing said property at the same figure as had been done the year prior; third, because of want of uniformity in assessment; fourth, because the amount of assessed valuation was increased by the assessor, after same was listed, without notice to owners; fifth, because, in fact, no assessed valuation was ever made or fixed by the local assessor."

Then follows a description of property owned by objectors, with the assessments of 1884 and 1885. The objections are signed by the land owners, per Forman & Watts, attorneys.

Upon hearing, the court, against the collector, permitted the objectors to introduce evidence as follows:

D. C. Rose, being duly sworn, stated that he was deputy assessor in the year 1885 for the south half of township 2 south, range 1 west, in Washington county, Illinois, in which territory the lands of said objectors are situated; that he fixed the values of lands at their fair cash value, as understood by him; that he did not understand he was making any assess-

Statement of the case.

ment at all; that he thought the county board or assessor would make the assessment from his figures, and that he told parties assessed that their assessment would be about as the year before,—which would be one-third of his figures. On cross-examination, said Rose stated that he placed his figures in a book furnished him by the county assessor, in the column headed "fair cash value;" that he supposed the county board or county assessor would reduce these figures to one-half or one-third, or whatever proportion would be necessary to raise the requisite amount of taxes; that whenever asked about the matter by land owners, he told them his figures were the fair cash value, and that the county board or county assessor would reduce them to one-half or one-third, or whatever proportion might be necessary to raise the requisite amount of taxes; that as a matter of fact he made no false or fraudulent representations, unless these statements, honestly made, amounted to fraudulent representations.

Hugh P. Green, on oath, stated that he was assessor of Washington county, Illinois; that D. C. Rose was one of his deputies, and as such deputy assessed the property of objectors, together with other property; that all his deputies received their books and instructions, in a body, at the same time, and were instructed to assess real estate at about one-third its fair cash value, and to put it in the column marked "fair cash value;" that Rose was present with the others, and heard these instructions; that real estate assessed by other deputies was assessed at about one-third its fair cash value.

J. P. M. Harrison, on oath, stated that the mill property was valued, in his presence as one of the owners, at \$15,000, and that Rose told him the final assessment would be \$5000, and that the assessment of property would be one-third of his figures.

Other witnesses were offered, but it was admitted that they would swear substantially the same as Harrison as to the manner of assessing.

Briefs of Counsel.

The judgment of the court is in the usual form, except as to lands and lots of objectors, and, after describing such lots and lands, is as follows: "On all the above lots, parts of lots, tracts or parts of tracts, or parcels of real estate, judgment is rendered for one-third of the amount for which judgment is applied, and judgment is refused as to the other two-thirds, and the sheriff and *ex officio* collector to be credited with the other two-thirds."

From the judgment so rendered as to the tracts and lots of objectors, the collector prosecutes this appeal.

Mr. CHARLES T. MOORE, State's Attorney, for the appellant:

The court erred in allowing the introduction of parol evidence to impeach the assessment. *Spencer v. People*, 68 Ill. 510.

The objectors had a complete remedy before the county board sitting as a board of equalization, and failing to pursue it, can not be heard to object on the application for judgment. The statements of the deputy assessor show no fraud in the assessments made by him. He assessed as the law required, at the fair cash value of the property, and there is no fraud in so doing. His duty did not depend on what others may have done.

The courts have no power to revise or set aside an assessment. *Spencer v. People*, 68 Ill. 510; *Porter v. Railroad Co.* 76 id. 561.

The tax-payer must take notice of his opportunity to have his assessment corrected. *Humphreys v. Nelson*, 115 Ill. 46.

Messrs. FORMAN & WATTS, for the objectors:

The authorities cited by appellant are cases where there was no fraud, either in fact or in law, and the parties carelessly, and without excuse, failed to appear before the board.

The evidence in this case establishes the fact that the owners of the property did not appear before the board, on account

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of the assurance of the assessor that the valuations were the same as previous years.

The evidence of Harrison and the assessor as to the mill is, that Harrison was informed that the assessed valuation of the mill was \$5000. It is, in fact, \$15,000. It is admitted that other property holders were so informed as to their property. Relying on these statements, and believing them to be true, there was no need of their appearing before the board.

Will it be wise to hold that the people dare not rely on statements of the assessor as to valuations made by him, when such statements are made in the performance of his duty as an officer?

In addition to this, the assessor, who is said to have fixed the value, swears that he did not place any assessed value upon the property at all. If he did not, was there any legal valuation of this property? Such conduct of the deputy assessor is a fraud in fact, and for that reason the judgment of the county court was right and proper.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

The questions presented by this record, involving the correctness of the judgment for taxes against the lots and tracts of land therein mentioned arise upon the assessment of such lots and tracts. All other requirements of the statute, precedent to the right of the People for judgment for taxes levied, seem to have been strictly conformed to. The taxes were levied for purposes authorized by law, and within the limit prescribed.

The county court, upon the application for judgment, heard evidence in respect of the assessment, and rendered judgment against the several tracts involved in this appeal, for one-third of the taxes extended against the same, severally, upon the assessment as returned by the assessor, and refused judgment as to the residue. The constitution provides, that "the General Assembly shall provide such revenue as may be needed,

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by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to his, her or its property, such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise."

The legislature, in counties under township organization, and those not under township organization, has designated and directed the persons who shall determine the value of property for the purposes of taxation, and prescribed the method, not only for the ascertainment and certification of such values, but also for the correction of any errors that may have been made in the assessment. (Revenue act, secs. 76, 84, 90, 97; Starr & Curtis' Stat. 2052, *et seq.*) The second clause of section 97 provides that the county board, at its July meeting, shall, "on the application of any person considering himself aggrieved, or who shall complain that the property of another is assessed too low, * * * review the assessment, and correct the same, as shall appear just." In counties under township organization, provision is also made for review of the assessment by the township board, prior to the July meeting of the board of supervisors. The assessor, alone, is the person or officer who can, in the first instance, determine the value of property for the purposes of taxation; and no appeal to or right of review by any tribunal, other than the boards mentioned, is given by law. It has been so repeatedly held by this court, under this and similar statutes, that the courts are powerless to revise an assessment, or change or set aside a valuation of property made by an assessor, or by the boards authorized by law to review the same, when the assessment has been honestly made upon property subject to taxation, and upon the proper basis, that a re-statement of the reasons for such holding would seem unnecessary. See *Spencer v. The People*, 68 Ill. 510; *Lyle v. Jacques*, 101 id. 644; *English v. The People*, 96 id. 566; *Adsit v. Lieb*, 76 id. 198; *Porter v. Rockford, Rock Island and St. Louis Railroad Co.* id. 561; *Re-*

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public Life Ins. Co. v. Pollak, 75 id. 292; *The People v. Big Muddy Iron Co.* 89 id. 116; *Felsenthal v. Johnson*, 104 id. 21; *Humphreys et al. v. Nelson*, 115 id. 45.

Here, the property was subject to taxation, the tax legal, and the assessment, as returned by the assessor, apparently made in conformity to the mode prescribed by the statute, and by the proper officers. The assessment was returned within the time required, verified by the oath of the assessor, as required by the 90th section of the act, showing, among other things, that the values designated therein were the fair cash values of the lots and tracts of land severally assessed by him. The determination of value by the assessor, when exercised in conformity to the statute, is judicial in its character; and so long as he keeps within the rules prescribed by law for his guidance and conduct, his acts, except in the manner provided by the statute, are not the subject of review, nor can they be impeached or set aside except for fraud or want of jurisdiction of the property assessed. (*Ottawa Glass Co. v. McCaleb*, 81 Ill. 556.) So it has been held, where the assessor has acted honestly, but erred in judgment by assessing too high or too low, the court will not interfere or disturb the assessment. (*City of Chicago v. Burtice*, 24 Ill. 489; *Elliott v. City of Chicago*, 48 id. 294.) And that therefore evidence tending to show excessive valuation was properly excluded. *Spencer et al. v. The People*, *supra*, and authorities cited.

But two points are urged against the validity of the assessment of the lots and tracts here involved, all other objections being wholly unsupported by the evidence introduced, and abandoned by counsel in argument in this court. It is said, first, that no assessment of these lots was in fact made; and second, that the assessment of the same was excessive, and that by the false statement of the assessor at the time of the assessment, objectors were prevented from applying to the county board for redress. It is manifest, if no assessment was in fact made by the assessor, the court should have sus-

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tained the objection to the whole tax. If the assessment and return could be contradicted by parol, the evidence fails to sustain the contention of counsel.

By the statute, (sec. 76,) the assessor, between the first day of May and the first day of July, is required to actually view and determine, as nearly as practicable, the fair cash value of each tract or lot of land listed for taxation, and set down in the proper column, in the book furnished him, the value of each tract or lot, etc., and by section 90 is required to return his assessment on or before the first day of July, verified by his affidavit, etc. The evidence shows that the deputy assessor actually viewed the premises, and did determine the actual cash value of the lots and tracts of land of objectors, severally, and set down, in his book, opposite each tract, under the appropriate heading, such fair cash value as determined by him, and that the same was returned as the assessment of such tracts and lots. It can make no possible difference that the deputy supposed that his work was subject to review by some one else, or that his assessment would be reduced. His valuation was upon the basis fixed by law for determining the valuation of property for taxation, and no other basis could have been adopted that would have been a compliance with the law.

It is shown that the valuation of the lots made by the assessor was made and entered in the presence of the objectors, and they knew he made the same upon the basis of their fair cash value. No objection seems to have been made then, nor is it urged now, that there was any over-valuation upon that basis. Objectors are presumed to have known that the assessor was required by law to assess their property at its fair cash value, and return, under oath, that he had done so, and that there was no authority of law for reducing the valuation below such value. It is true the evidence shows that the county assessor instructed his deputies to assess at one-third of the fair cash value, all property, and that some of the property of the county,—to what extent does not appear,—was so assessed; but that

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can form no basis for resistance to the payment of taxes by objectors, for the reason, as we have seen, if the property of others was assessed too low, they might have appeared before the county board, and upon complaint, and the inequality appearing, the board would have reviewed the assessment and have corrected the same, as should appear just. The omission to assess others liable to taxation, or to assess portions of their property, or the assessment of the property of others at less than its fair cash value, while it may cause the tax-payer whose property is assessed at its fair cash value, to bear an undue portion of the public burden, will not affect the validity of the tax. *Dunham v. City of Chicago*, 55 Ill. 357; *Spencer et al. v. The People*, *supra*.

It is not shown or contended that the deputy assessor was guilty of any fraud in making the assessment complained of. On the contrary, it is shown that he acted honestly, and in good faith determined the fair cash value of the property of objectors, and entered it in the assessor's book accordingly; but it is urged that objectors were misled into supposing that some one else would reduce their assessment. It is shown that the deputy stated to Mr. Harrison, that property he estimated at \$15,000 as its fair cash value, and so put down by him, would be reduced to \$5000; and to others, that the county board would reduce his valuation to one-third thereof, or to whatever would be sufficient to raise the requisite amount of taxes, etc. And it is said, but for these statements objectors could have applied to the county board, and would have done so, and had their assessments reduced. There are several manifest answers to the position that such representations would affect the validity of the assessment. The objectors are presumed to know the law, and that the assessor was required by law to assess their property at its fair cash value, and return his assessment, under oath, that it was so assessed, and that the county board were not authorized to determine the amount of taxes required, except for county purposes, and were powerless

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to reduce the assessment upon that basis or any other, except upon complaint that an assessment was too high or too low, or by way of equalization of the whole assessment of the county. But the fraud contemplated, and which will authorize courts to interfere and declare an assessment void, is such as affects the assessment itself. If, however, such representations were fraudulently made, they were not in respect of the assessment as then made by the deputy, and if prejudicial to objectors, are so only in that they prevented their taking other steps to reduce the assessment. The only duty of the assessor was to view, assess and return an assessment of property at its fair cash value. Except when sitting as a member of the board of town review, he is not authorized to reduce assessments; and any statements he might make at the time of making an assessment, could have no greater force than if made by a stranger, and objectors having had notice of the assessment, were not relieved by his declarations from petitioning the county board, if entitled to have their assessment reduced.

But the complete answer to the contention is, that there is no pretence that injustice has been done objectors. While the statute remains as it is, assessments are rightly and justly made upon the basis of the fair cash value of the property assessed.

We think that the evidence was improperly admitted, and that the county court erred in not rendering judgment for the full amount of the tax extended against the land of objectors.

The judgment of the county court is therefore reversed, and the cause remanded for further proceedings in conformity with this opinion.

Judgment reversed.

Syllabus.

THE PEOPLE, for use of Logan County,

v.

WILLIAM TOOMEY *et al.*

Filed at Springfield September 27, 1887.

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1. COUNTY CLERK—compensation. Where the salary and clerk hire of a county clerk have been fixed by the county board, his office being one in which fees are provided for, his compensation can only be paid out of the fees actually collected, and can not exceed them. He can only receive the amount so fixed in case the fees of his office equal that sum each year, and if such fees exceed that amount, he is bound to pay the excess into the county treasury.

2. A county clerk, after receiving from fees earned and collected the full amount of his salary, clerk hire and other expenses, is not entitled to an allowance by the county board of the fees due him from the county for work done for the county. It would be an idle ceremony to pay him out of the treasury and then order him to pay the same back.

3. OFFICIAL BOND—liability of surety. A surety is not to be held beyond the precise terms of his contract. His liability is *strictissimi juris*, and can not be extended by construction.

4. Where the term of an officer is for a definite or fixed period, the surety on his bond is only liable for his faithful performance of his duties during that period. If the bond is silent as to the length of the term, but the statute under which the bond is given fixes the term, the statute, in that regard, will be taken as a part of the contract.

5. SAME—liability on county clerk's bond. The condition of a county clerk's bond was, that he should "perform all the duties which are or may be required by law to be performed by him as county clerk of the said county of L., in the time or manner prescribed by law or to be prescribed by law." After the expiration of his term of office the clerk made a report to the county board, showing in his hands, of fees collected, the sum of \$414 over and above his compensation as fixed by the board, and his clerk hire and other expenses of the office, which amount he paid into the county treasury. At the same time he presented a bill for services rendered to the county in his capacity as clerk, which the board allowed, and on the order issued therefor he drew a considerable sum, to which he was not entitled. Failing to pay this sum back into the county treasury, suit was brought on his official bond: *Held*, that his sureties were not liable for his failure to pay such sum of money.

Brief for the Appellant.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Logan county; the Hon. GEORGE W. HERDMAN, Judge, presiding.

Mr. ROBERT HUMPHREYS, State's Attorney, and Mr. OSCAR ALLEN, for the appellant:

A county officer in this State must account with the supervisors after he goes out of office, and can not fully account before, and he, of course, must account fully.

Sureties are liable for the due performance of an officer's duties, even such as it may be incumbent on him to perform after the expiration of his term of office. Murfree on Official Bonds, p. 424, sec. 631.

A sheriff received redemption money after his term expired, and his sureties were held liable. *Elkin v. People*, 3 Scam. 207.

A county clerk fraudulently countersigned and filled up a warrant that had been signed in blank, and drew the money, and it was held that his sureties were liable. *People v. Treadaway*, 17 Mich. 480.

A county treasurer did not cancel paid orders. They were afterward stolen and came into innocent hands, and a loss ensued. His sureties were held liable, not because the loss occurred during his term, but because the loss was the result of misconduct during his term. *Johnson County v. Hughes*, 12 Iowa, 360.

A sheriff refused to turn over property after his term had expired, and his sureties were held liable. *Baker v. Baldwin*, 18 Conn. 131.

A deputy collector, continuing to hold during successive terms, gave but one bond. His sureties were held liable for deficiency in the last term, because it was the evident intention. *Delacour v. Caulfield*, 1 Irish Com. Law, 669.

The sureties of a circuit clerk were held liable for money received by him after his term expired, under order of court

Brief for the Appellees.

previously made. *State v. Bird*, 6 Jones' Law, (N. C.) 62. Of similar effect are *Tyree v. Wilson*, 9 Gratt. 39; *State v. Muir*, 20 Mo. 303.

In the earliest and leading case upon similar subjects, (that of *Lord Arlington v. Merrick*, 3 Saund. 403,) the whole case seems to be made to rest upon evident intention,—that there was no misconduct during the time which the bond was evidently intended to cover.

Can it be doubted that in this case Toomey himself is liable for the amount sued for, and upon his *bond*? If the principal is liable on the *bond*, then his sureties are also liable. *Seaver v. Young*, 16 Vt. 662.

Messrs. BLINN & HOBLITT, and Messrs. BEACH & HODNETT, for the appellees:

The liability of sureties is *strictissimi juris*, and can not be extended by construction or enlarged by the acts of others. *People v. Pennock*, 60 N. Y. 426; *McClusky v. Cromwell*, 1 Kern. 593; *Supervisors v. Bates*, 17 N. Y. 242; *Loan Association v. Nugent*, 11 Vroom, 215.

The violation of the condition of the bond must have been during the term of the office. *People v. Pennock*, *supra*; *Mayor of Rahway v. Crowell*, 11 Vroom, 207; *Insurance Co. v. Clark*, 33 Barb. 196; *Gilbert v. Luce*, 11 id. 91.

The surety can only be held liable for official acts done or omitted. *Gerber v. Ackley*, 37 Wis. 44; *State v. Mann*, 21 id. 695.

The surety's liability can not be extended so as to embrace acts done after the term of office has expired. *Society v. Johnson*, 1 McCord, 41; *Wright v. Russell*, 3 Wils. 530; *Baker v. Parker*, 1 T. R. 287; *Shange v. Lee*, 3 East, 434; *Water Works v. Harpley*, 6 id. 507; *Commissioners of Public Accounts v. Greenwood*, 1 Eq. 450; *Montgomery v. Hughes*, 65 Ala. 201; *Loan Association v. Nugent*, 40 N. J. L. 207; *Offutt v. Commonwealth*, 10 Bush, 212; *Florence v. Richardson*, 2 La. Ann.

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663; *Governor v. Coble*, 2 Dev. Law. 489; *Holloman v. Langden*, 7 Jones' L. 49; *Overacre v. Garrett*, 5 Lans. 156; *Bryan v. United States*, 1 Black, 635; *McLain v. People*, 85 Ill. 209; *Phillips v. Singer Manf. Co.* 88 id. 305; *McIntyre v. Trustees of Schools*, 3 Bradw. 77.

A surety on an official bond is not liable for losses caused by the misconduct of the obligee. Murfree on Official Bonds, secs. 755, 788; *O'Donohue v. Simmons*, 31 Hun, 267; Brandt on Suretyship, 457; *Pickering v. Day*, 3 Houston, 474; *Connell v. Crawford*, 59 Pa. St. 196.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

This is an action of debt, brought by the People, for the use of Logan county, against William Toomey and his sureties, upon the official bond of William Toomey as county clerk of Logan county from December, 1881, to December, 1882. The following is the condition of the bond:

"The condition of the above bond is such, that if the above bounden William Toomey shall perform all the duties which are or may be required by law to be performed by him as county clerk of the said county of Logan, in the time or manner prescribed by law, or to be prescribed by law, and when he shall be succeeded in office, he shall surrender and deliver to his successor in office all books, papers, moneys and other things belonging to said county, and appertaining to his said office, then the above bond to be void, otherwise to remain in full force."

By stipulation between the parties, the only question to be determined is the liability of the sureties for the payment of the item of \$2133.78, hereafter referred to.

C. M. Knapp was elected as the successor of Toomey in the office of county clerk of Logan county, for the term beginning in December, 1882. Knapp's official bond is dated November 13, 1882, and was approved by the county judge on No-

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vember 16, 1882. He took the oath of office as county clerk on November 13, 1882. The commission issued to him by the Governor bears date December 1, 1882, and authorizes him to perform the duties of the office "on and after December 4, 1882." The board of supervisors of Logan county met on Monday, December 4, 1882, at one or two o'clock in the afternoon, and Knapp assumed his duties as county clerk at that time. W. O. Jones then appeared before the board as deputy clerk, appointed by Knapp. Jones says in his testimony: "I was appointed deputy under Mr. Knapp the first thing in the morning when Mr. Knapp took possession, December 4, 1882. I think the board met at two o'clock of that day, with Mr. Knapp as clerk."

The circumstances here recited, and other evidence in the record, show clearly that Toomey's term of office had ended by one or two o'clock in the afternoon of Monday, December 4, 1882, and at and from that time Knapp became and was county clerk of the county, duly qualified, and installed in office.

Under section 10, of article 10, of the constitution, and the statute passed in pursuance thereof, the board of supervisors of Logan county had, in 1877, fixed the salary of the county clerk for the ensuing year, etc., at \$1600 per annum, and clerk hire at \$1200 per annum. It is admitted that Toomey was only entitled to \$2800 for salary and clerk hire for the last year he was in office, from December, 1881, to December, 1882. As his office was one "where fees are provided for," (Const. art 10, sec. 10,) his compensation could only be paid out of the fees actually collected, and could not exceed them. He could only receive the \$2800 in case the fees of his office equalled that amount each year, and if such fees exceeded that amount, he was bound to pay the excess into the county treasury.

The statute, (Hurd's Rev. Stat. 1885, chap. 53, sec. 51, p. 631,) requires of every county officer who is paid by fees, that,

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in a book to be kept for that purpose, he shall keep a full, true and minute account of all the fees and emoluments of his office, designating in corresponding columns the amount of all fees and emoluments earned, and all payments received on account thereof, and showing the name of each person or persons paying fees, and the amount received from each person, and shall also keep an account of all expenditures made by him on account of clerk hire, stationery, fuel and other expenses; that he shall, on the first days of each June and December, make to the chairman of the board of supervisors, etc., a return, in writing, of all the fees and emoluments of his office, of every name and character, which said report shall show the gross amount of the earnings of said office, the total amount of receipts, of whatever name or character, and all necessary expenses for clerk hire, stationery, fuel and other expenses, for the half year ending at the time of such report, etc., together with the amount of his salary, etc.; such reports shall designate the service for which such amounts have been charged or received, in such manner that the same may be identified with the account thereof upon the books of such officer, and shall show, fully, the amount earned and the amount received. It is made the duty of the county board to carefully audit and examine every such report, and if, after deducting from the gross amount shown to have been collected the amount allowed for salary and expenses, there is a balance of such fees in the hands of the officer, the board shall order him to pay such balance to the county treasurer. These reports are required to be verified by the affidavit of the officer making them.

A report was made by Toomey of his receipts and disbursements for the six months from June to December, 1882, and was submitted to the board of supervisors on December 4, 1882, and referred to the committee on finance. This report is not in the record. It was lost. The proof shows, however, that it was an exact copy of the cash book. It showed all

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fees collected and disbursements made during the last six months of the term, and that there was in Toomey's hands, after giving him credit for his salary and expenses, a surplus of fees amounting to \$414.23. On December 6, 1882, the board of supervisors adopted the report of the finance committee, finding Toomey's report to be correct, and then made an order directing him to pay the \$414.23 to the county treasurer, which he did December 11, 1882.

While the report so made by him showed the fees collected, it did not show, as it should have done, the fees earned and not collected. (*Daggett v. Ford County*, 99 Ill. 334.) On December 2, 1882, Toomey made out an itemized bill against Logan county for fees due him from the county, for extending taxes, making statements for the auditor and treasurer, issuing county orders, recording proceedings of board, per diem in county court, etc., amounting in the aggregate to \$2133.78. To this he attached a certificate, under his hand and the seal of his office, certifying "that the above bill, by me this day rendered, is just and correct, and remains due." No affidavit was attached. The total of the bill represented fees earned and not collected. No part of the sum of \$2133.78 appeared in the report. This bill or statement of the items of the sum of \$2133.78 was presented to the board on Monday afternoon, by Knapp, Toomey's successor, at the same time when the report showing a balance due of \$414.23 was presented. It was referred on December 4, 1882, to the committee on claims. This committee examined it, and reported to the board that the amount of it should be paid to William Toomey. Thereupon, the board of supervisors, on or about December 6, 1882, made an order directing the county clerk, C. M. Knapp, to draw an order on the county treasurer for the sum of \$2133.78, payable to William Toomey, which he did. On December 9, 1882, Knapp delivered this order to Toomey, who presented it to the county treasurer, obtained the money, and has never repaid it.

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We do not think that the sureties on Toomey's bond are liable for the payment of the \$2133.78.

The money came into the hands of Toomey after his term of office had expired, and after his successor had become qualified, and had taken possession of the office and assumed the performance of its duties. A surety is not to be held beyond the precise terms of his contract. His liability is *strictissimi juris*, and can not be extended by construction. Where the term of the officer is for a definite or fixed period, the surety is only liable for his faithful performance of his duties during that period. This is clearly so where the bond itself specifies the period. If the bond is silent as to the length of the term, but the statute under which the bond is given fixes the term, the statute, in that regard, will be regarded as a part of the contract. In this case the sureties contracted that Toomey should "perform all the duties which are or may be required by law to be performed by him as county clerk of the said county of Logan, in the time or manner prescribed by law, or to be prescribed by law." They did not contract for his discharge of obligations which he might assume, or duties which might be imposed upon him, after he became a private individual. The board of supervisors directed Knapp, the county clerk, to pay to Toomey, who was no longer county clerk, the sum of \$2133.78, to which he was not entitled when he was county clerk, and to which he was still less entitled after he ceased to be county clerk. His sureties are not responsible for his failure to pay over moneys received by him under such circumstances. Murfree on Official Bonds, secs. 88, 215, 421; Brandt on Suretyship and Guarantee, secs. 139, 140; *Bryan v. United States*, 1 Black, 140; *United States v. Nicholl*, 12 Wheat. 505; *Placer County v. Dickerson*, 45 Cal. 12; *South Carolina Society v. Johnson*, 1 McCord, 41; *Lord Arlington v. Merrick*, 3 Saund. 403; *Mayor of Rahway v. Crowell*, 40 N. J. L. 207; *People v. Peacock*, 60 N. Y. 421; *Gilbert v. Luce*, 11 Barb. 91; *McCluskey v. Crom-*

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well, 11 N. Y. 593; *City Council of Montgomery v. Hughes*, 65 Ala. 201; *Offutt v. Commonwealth*, 10 Bush, (Ky.) 212.

It is true that Toomey made out a statement of the fees earned by him for extending the taxes, etc., upon a separate sheet of paper, and did not make it a part of his report showing his receipts and disbursements, but the board had his report and his statement before them at the same time. Of the fees collected and earned by him for the last six months, he was only entitled to what was due him for salary and expenses. All the balance belonged to the county. His report showed that he had been once paid, and owed the county, for money actually in his hands, the sum of \$414.23. He was not entitled to any part of the \$2133.78, representing fees earned by him. If these fees had been due from third persons, it would have been the duty of his successor to collect them. This appears from the fourth clause of the 51st section of the Fees and Salaries act, which provides, that where there is a balance of salary due an officer at the end of his term, and the amount of fees collected by him, and in the hands of the treasurer, is insufficient to pay such balance, "it shall be paid to him out of the fees earned by him during his term of office, when afterwards collected by his successor." But the fees set out in the statement were not due from third persons; they were due from the county itself, for work done for the county. As there was no unpaid balance due to Toomey on account of salary or expenses, it would have been an idle ceremony for the board to order either Toomey or Knapp to draw the amount of these fees, which already belonged to the county, from the county treasury, and then order the same to be paid back into the county treasury. The board should simply have approved Toomey's statement of his earnings from the county, and should have allowed the matter to rest there. Instead of doing so, they not only directed Knapp to give Toomey an order on the county treasurer for the amount of these fees, but they failed to make any order directing Toomey to pay

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them back into the treasury. If it was proper to order him to pay over \$414.23 of fees collected and retained by him, it was improper to permit him to receive fees earned but not yet collected, especially as he was not ordered to turn them back into the treasury, where they belonged.

Although the bond in this case runs to the people, it belongs, as matter of fact, to the county of Logan. This suit is brought for the use of Logan county. Logan county is the real obligee in the bond. The obligee in the bond, through its representative, the board of supervisors, has improperly, and through a want of due care and prudence, taken a sum of money out of the county treasury which ought to have been allowed to stay there, and placed it in the hands of Toomey, who had no right to it, after the expiration of his term of office; and now that he refuses to pay it back, such obligee seeks to collect it from those who were sureties on his official bond while he was in office. To enforce its collection from them, under the circumstances, would not be right. Murfree on Official Bonds, secs. 755, 788.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

MARIA ANNA LEHNDORF *et al.*

v.

ALLEN COPE.

Filed at Mt. Vernon September 28, 1887.

1. COVENANTS FOR TITLE—*limited to the estate actually conveyed.* The estate granted by a deed is neither enlarged nor restricted by the covenants for title therein contained or implied. Such covenants are but an assurance of the title granted, no matter to whom the grant is made. If the grantee takes but a life estate, the covenants assure that estate; and if he takes an estate in fee tail, the covenantor warrants to him but a life estate, and the remainder in fee to the one who will take upon the termination of the life estate.

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133	68
122	317
150	225
122	317
156	81
122	317
70a	302
122	317
85a	435
85a	438
122	317
192	257
122	317
196	44
197	586
122	317
199	470
122	317
202	284
122	317
208	1858
122	317
210	111

Syllabus.

2. CONSTRUCTION OF CONTRACTS—*its object and purpose.* The legitimate purpose of all construction of instruments in writing is to ascertain the intention of the party or parties making the same; and when this is determined, effect will be given thereto accordingly, unless to do so will violate some established rule of property.

3. SAME—*giving effect to every part of the instrument.* As it can not be presumed that words or terms in a conveyance were used without a meaning, or having some effect given to them, therefore, if it can be done consistently with the rules of law, that construction will be adopted which will give effect to the instrument and to each word and term employed, rejecting none as meaningless or repugnant.

4. SAME—*determining the nature and quantity of estate granted by deed.* The nature and quantity of the interest or estate granted by a deed are to be ascertained from the deed itself, and are to be determined by the courts, as a matter of law. While the intention of the parties will control in the construction of the deed, it is the intention, apparent and manifest in the instrument, construing each clause, word and term involved in the construction according to its legal import, and giving to each thus construed its legal effect.

5. ESTATES IN LAND—*estate less than a fee—express words of limitation not essential.* In order to create an estate less than a fee, it is not necessary there shall be express words of limitation, either under the statute, (section 13 of the Conveyance act,) or at common law. It is sufficient for that purpose if it appear, by necessary implication, that a less estate is intended to be granted.

6. SAME—*estate tail, as at the common law, becomes a life estate under the statute.* Under our statute, (section 6 of the Conveyance act,) in all cases where, by the common law, any person might have become seized in fee tail of any lands, such person, instead of becoming seized thereof in fee tail, will take an estate for his life only, and the remainder will pass in fee simple to the person or persons to whom the estate tail would, on the death of the first grantee or donee, have passed at common law.

7. SAME—*life estate, with remainder over—a deed construed.* A deed of a tract of land to A, a married woman. "and her heirs by her present husband, B," conveyed to her what would have been an estate tail by the common law, but under our statute an estate for her life, only, with remainder in fee to her heirs by B, or those to whom the estate was immediately limited. It was held, the words, "to her heirs by her present husband, B," meant, to the issue of her body by her then present husband begotten.

8. In such case, if no issue of the body of the immediate grantee had been living at the date of the deed, or of its delivery, she would have taken only a life estate, and the remainder would have been what is known as "a contingent remainder;" but there being two of such children in esse, the remainder vested immediately in them in fee, subject to the possibility

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of being divested *pro tanto*, if the grant should be opened to let in after-born children of the same description.

9. *SAME—mortgage by grantee for purchase money—as embracing a less estate than that conveyed.* The owner of land conveyed the same to a married woman, "and her heirs by her present husband," she having at the time two such heirs, and she and her husband at the same time executed to the grantor a mortgage of the premises to secure a part of the purchase money not paid, evidenced by the wife's notes, and the mortgagee sold and assigned the same: *Held*, on bill by the assignee to foreclose, that the mortgage was limited to the life estate of the wife, and created no incumbrance on the remainder which vested in the heirs.

10. While it is true that a deed for land, and a mortgage of the same date taken for the purchase money, are but parts of a single transaction, nevertheless, one estate may be conveyed by the deed and a wholly different interest by the mortgage. If the vendor sees fit to take security by mortgage upon less than the whole land sold, or upon less than the estate conveyed, the contract will be valid, and the residue of the land or estate will pass by the deed, unencumbered by any lien in his favor.

11. *VENDOR'S LIEN—its nature—waiver by taking other security.* A vendor's lien is the creation of courts of equity, based upon the equitable consideration that when the vendor has taken no security and done no act showing an intention to waive the lien, the presumption in such case is, that it is not the intention of the parties that one should part with and the other acquire the title without payment of the purchase price. The lien exists independent of any contract, is personal to the vendor, and whenever it appears that the vendor did not rely upon the lien at the time of the sale, or has subsequently abandoned it as security, it will be held to be waived.

12. Where a vendor conveys to another a life estate only, with remainder to the heirs of the grantee in fee, and takes back a mortgage from the holder of the life estate to secure the payment of the unpaid price, the grantor will have no vendor's lien upon the premises sold for the purchase money.

13. *SAME—not assignable.* The lien created by implication in favor of a vendor, is personal as to him, and is not assignable or transferable, even by express contract between the vendor and an assignee. It can be enforced only by the vendor himself.

WRIT OF ERROR to the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

James W. Humphrey, being the owner of the lands in controversy, bargained with Maria Anna Lehndorf for the sale thereof, for \$5100, and, joined by his wife, on the 3d day of August, 1883, by statutory form of warranty deed, in consid-

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eration of that sum, did "convey and warrant to Maria Anna Lehndorf, and her heirs by her present husband, Henry Lehndorf," said lands. Two thousand dollars of the purchase money was paid in hand, and two notes of Maria Anna Lehndorf were given, for \$1550 each, payable, with interest, to said Humphrey, in twelve and twenty-four months, respectively. At the same time, and as part of the same transaction, a mortgage in statutory form was duly executed and delivered by said Maria Anna Lehndorf, and Henry Lehndorf, her husband, upon the same lands, to secure the said two notes,—all being done simultaneously, and as parts of the same transaction. James W. Humphrey afterwards sold, indorsed and delivered the said notes to Allen Cope, defendant in error.

On the 26th day of December, 1885, said Maria A., joining with her two sons, Paul and Albert Lehndorf, executed and delivered a deed conveying to Elizabeth Wirtz said lands. The first deed and mortgage mentioned were duly recorded August 8, 1883, the latter, December 26, 1885. The notes remaining unpaid after due, Cope, assignee thereof, filed this bill to foreclose the said mortgage, making Maria A. Lehndorf, Henry Lehndorf, her husband, Paul, Albert and William Lehndorf, (children of Maria and Henry,) and Elizabeth Wirtz, defendants.

The bill, after alleging the sale of the land by Humphrey to Mrs. Lehndorf, and making the deed, mortgage and notes exhibits, sets up the foregoing facts, and then proceeds, at the request of said Maria A. Lehndorf, the said James W. Humphrey, and his wife, Sarah F. C. Humphrey, conveyed and warranted said lands and real estate to her, by the name and style of Maria Anna Lehndorf, and her heirs by her present husband, Henry. Lehndorf, by a deed of conveyance, bearing date the said 3d day of August, 1883, duly recorded the 8th of August, 1883.

"Complainant submits that said Maria Anna Lehndorf can have no heirs while living, and that the words, 'and her heirs

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by her present husband, Henry Lehndorf,' are surplusage in said deed, and that said Paul, Albert and William Lehndorf take no interest, either in law or equity, in said lands and real estate by virtue of the same being incorporated, as aforesaid, in said deed of conveyance. And complainant further shows that said Paul, Albert and William Lehndorf paid nothing of the purchase money of said lands and real estate to said James W. Humphrey, and of any interest of said lands, by virtue of said words or otherwise. Such interest would be subject to the payment of the purchase money of said lands and real estate, and subject to the rights and equities of your complainant to have said lands and real estate subjected to the payment of said purchase money so secured by said notes and mortgage, as aforesaid. Complainant further shows, that on, to-wit, the 26th day of December, 1885, Maria Anna Lehndorf, Paul and Albert Lehndorf, executed, acknowledged and delivered to one Elizabeth Wirtz, of St. Louis, Missouri, a warranty deed of conveyance, purporting to convey and warrant said lands to said Elizabeth Wirtz, which said deed was duly recorded in said Marion county, in record book 41, page 55. Complainant charges, on information and belief, that said conveyance so made by Maria Anna, Paul and Albert Lehndorf, to said Elizabeth Wirtz, was without any consideration; that said Elizabeth Wirtz is the mother of said Maria Anna Lehndorf, and that she paid nothing for said lands and real estate to said Maria Anna, nor to said Paul or Albert Lehndorf, but said conveyance was made to embarrass in the collection of said notes. Complainant submits that if said conveyance of said lands and real estate to said Elizabeth Wirtz was in good faith, the rights of said Elizabeth Wirtz acquired by such conveyance would be subject to the rights and equities of complainant in and to said lands and real estate."

The bill prays for appointment of a guardian *ad litem* for Paul, Albert and William Lehndorf, who are alleged to be minors; that an account be taken of the amount due com-

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plainant on the mortgage; that in default of payment, sufficient of the land be sold to pay the amount found due; that the rights and equities of the defendants be decreed subject to the equities of complainant, and that they be barred, etc., of the equity of redemption.

The defendant Maria A. Lehndorf answered, admitting the making of the deeds and mortgage, and that the notes mentioned, and secured by the mortgage, were part of the purchase money; admits that it was agreed between her and said Humphrey, that in making the conveyance of said land the deed should be made to Maria Anna Lehndorf and her heirs by her present husband; that said deed was so made for the purposes in the deed expressed, and with the intent to so convey the land, and not otherwise; denies that she agreed to purchase and take a conveyance to herself, but that the deed was intended to convey said lands to her and her heirs by her husband, Henry Lehndorf, and not otherwise; avers that the deed conveyed an estate for life to her in said lands, and the fee therein to her heirs of said Henry, and that Humphrey well knew the same before and at the time of the execution of said deed; admits making notes as alleged, and mortgage to secure the same, but denies that it was upon any interest in the land not owned by her; that said mortgage was intended to be only of her life estate, and Humphrey well knew the same, and accepted the same with such knowledge and intent; avers that if complainant is owner of the notes, he held with notice that Maria Anna had purchased and taken by said deed only a life estate in said lands at and before he purchased said notes of said Humphrey; that Humphrey had taken and accepted a mortgage on her life estate for the security of said notes with full knowledge, and his assignee took no other or greater interest or right than he possessed; denies the right of complainant to other equitable relief; avers that Humphrey waived right to lien in equity for the purchase money by taking security by mortgage of life estate, and that upon the assignment of the

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notes he received pay and satisfaction of the purchase money, and thereby any right of equitable relief for the purchase money he might have had was lost; avers that her children by said Henry became and were owners in fee of said lands as tenants in common, subject to the life estate in herself, and subject, also, to be opened to let in other child or children that may be born to the body of said Maria by her present husband, Henry Lehndorf, etc.

The defendants Paul, Albert and William Lehndorf, by their guardian *ad litem*, demurred to the bill, and the demurrer was overruled by the court, and defendant Wirtz was defaulted. Decree was rendered foreclosing the mortgage, finding the interest of all the defendants subject thereto, and decreeing accordingly.

The only evidence introduced, other than the deeds, notes and mortgage mentioned, was that of the scrivener who drew the deed and mortgage of August 3, 1883, who identified the notes as those given at the time for the purchase money of the land; and it was shown, also, that Paul, Albert and William Lehndorf were the children of said Maria by her husband, Henry Lehndorf; that all were minors; two of them were born prior to the 3d day of August, 1883, and one since. The defendants below prosecute this writ of error.

Mr. J. B. KAGY, and Messrs. CASEY & DWIGHT, for the plaintiffs in error:

The vendor's lien can not be invoked in this case. *Moshier v. Meek*, 80 Ill. 79.

The deed from Humphrey and wife to Maria Anna Lehndorf conveys a life estate only. Starr & Curtis' Stat. chap. 30, secs. 6, 14; 1 Washburn on Real Prop. chap. 4, secs. 30-33, 38-41; Coke on Littleton, 206; 2 Preston on Estates, 485; 2 Blackstone's Com. (Chitty's ed.) *114, 115; *Voris v. Sloan*, 68 Ill. 588; *Beacroft v. Strawn*, 67 id. 28; *Hosmer v. Carter*, 68 id. 98; *Blair v. Vanblarcum*, 71 id. 290; *Frazer v. Board*

Brief for the Defendant in Error.

of Supervisors, 74 id. 282; *Cooper v. Cooper*, 76 id. 57; *Baker v. Scott*, 62 id. 86.

The mortgage given by the said Maria Anna Lehndorf to Humphrey was upon her life estate only.

The conveyance to Elizabeth Wirtz by Maria A. Lehndorf should have been sustained.

Mr. HENRY C. GOODNOW, for the defendant in error:

Every estate granted, etc., shall be deemed a fee simple estate, unless limited by express words, or when such estate is not granted. Conveyance act, sec. 13.

There are no express words of limitation in this deed. The word "heirs" is a word of limitation and not of purchase, and as no person can have heirs while living, the words, "and her heirs by her present husband," are surplusage. 1 Hilliard on Real Prop. p. 351, sec. 19; *Cooper v. Cooper*, 76 Ill. 57; *Baker v. Scott*, 62 id. 86.

There is no *habendum* clause in the deed defining the estate granted. It results, from the statute, by implication, an estate in fee passed. *Riggin v. Love*, 72 Ill. 553.

The words, "heirs of his body," are words of limitation and not of purchase. *Bristain v. Wilson*, 63 Ill. 175; 2 Washburn on Real Prop. (2d ed.) 268, 269.

The words, "heirs by her present husband, Henry Lehndorf," mean no more than "heirs of the body," and the words, "heirs of the body," are held to be words of limitation and not of purchase. *Beacroft v. Strawn*, 67 Ill. 28; *Baker v. Scott*, 62 id. 87.

The words, "heirs by her present husband," mean a class of persons to take in succession, from generation to generation, by descent, and not by purchase. *Beacroft v. Strawn*, 67 Ill. 28.

There being no *habendum* clause in this deed to limit or define the extent or certainty of the estate granted, we can only look to the words of the deed for the extent and certainty of the estate granted.

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The rules of construction require that all of the language of the grant shall be considered, and effect given to it, unless so repugnant or meaningless that it can not be done. *Cooper v. Cooper*, 76 Ill. 60; *Brownfield v. Wilson*, 78 id. 467.

The mortgage and deed must be taken together to find what these parties intended to do. They understood the fee in the land was held to secure the purchase money.

The children take, if they take anything, as volunteers, and hence have no equities against Humphrey or his assignee, Cope.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

It is contended by defendant in error, that by the deed of August 3, 1883, from Humphrey and wife to "Maria Anna Lehndorf and her heirs by her present husband, Henry Lehndorf," Mrs. Lehndorf took a fee simple estate in the lands conveyed, while plaintiffs in error contend that she thereby took a life estate only, with remainder in fee to her children by said Henry Lehndorf.

The deed being statutory in form, contains no *habendum* limiting or defining the estate taken by Mrs. Lehndorf, and although the deed must be held equivalent to one containing full covenants, (*Elder v. Derby*, 98 Ill. 228,) it is manifest that the estate granted would not be enlarged or restricted thereby. Such covenants are an assurance of the title granted to the grantees, whomsoever they may be. If Mrs. Lehndorf took the fee, the covenants assure that estate to her; if she takes an estate in tail, the covenantor warrants to her a life estate, and the remainder in fee to whomever would take upon determination of her estate. Therefore, as said by counsel for defendant in error, the determination of the question depends upon a construction of the granting clause of the deed, which is, that the grantors, in consideration, etc., "convey and warrant to Maria Anna Lehndorf, and her heirs by her present husband, Henry Lehndorf, of," etc., the lands in controversy.

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The legitimate purpose of all construction of a contract or other instrument in writing, is, to ascertain the intention of the party or parties in making the same, and when this is determined, effect will be given thereto, unless to do so would violate some established rule of property. The nature and quantity of the interest granted by a deed are always to be ascertained from the instrument itself, and are to be determined by the court as a matter of law. The intention of the parties will control the court in construction of the deed, but it is the intention apparent and manifest in the instrument, construing each clause, word and term involved in the construction according to its legal import, and giving to each thus construed its legal effect. Washburn on Real Prop. 404; *Bond v. Fay*, 12 Allen, 88; *Lippett v. Kelley*, 46 Vt. 516; *Price v. Sisson*, 13 N. J. Eq. 178; *Caldwell v. Fulton*, 31 Pa. St. 489; *Wager v. Wager*, 1 S. & R. 374.

It can not be presumed that the parties used words or terms in the conveyance without intending some meaning should be given them, or without an intent that the effect legitimately resulting from their use should follow; hence, if it can be done consistently with the rules of law, that construction will be adopted which will give effect to the instrument, and to each word and term employed, rejecting none as meaningless or repugnant.

We should, perhaps, first notice the contention of counsel for defendant in error, that by virtue of section 13 of the Conveyance act, (as there is here no express limitation upon the estate of Mrs. Lehndorf, and as no one can have heirs while living,) the words following the grant to her should be rejected, and the deed read as if to her only. This arises from a misapprehension of the statute. The evident purpose of the section referred to, was to change the rule of the common law, whereby, if a conveyance, etc., was made without words of inheritance, an estate for the life of the grantee only was created. The section is as follows:

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"Sec. 13. Every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised, by construction or operation of law."

It is not necessary, as seems to be supposed, that to create a less estate than the fee, there should be express words of limitation, either under the statute or at common law. It is sufficient for that purpose if it appear, by necessary implication, that a less estate was granted. In an early case, (*Frogmorton v. Wharrey*, 2 W. Black. 728,) where there was a surrender of copyholds by R., who was seized in fee, to M., his then intended wife, and the heirs of their two bodies, etc., WILMOT, C. J., delivering the opinion of the court for himself, BATHURST, GOULD and BLACKSTONE, JJ., after holding, on authority of *Gossage v. Taylor*, Styles, 325, and *Lane v. Pannel*, 1 Roll. 438, that the children thus begotten took as purchasers and not as heirs, says, the only difference in the cases is, that in those cases "the wife had an express estate for life, and here not. But upon legal principles the cases are just alike. An estate 'to A, and the heirs of his body,' is the same as an estate 'to A for life, remainder to the heirs of his body.'" By operation of law, the added words created, in the case cited, in M. a life estate only, with remainder to the heirs of herself and R., as purchasers. So the grant "to A, and the heirs of his body," by operation of law creates an estate tail in A, remainder in tail. And this has been the uniform holding.

The sixth section of the Conveyance act provides, that in cases where, by the common law, any person or persons might, after its passage, become seized in fee tail of any lands, etc., by virtue of any gift, devise, grant or conveyance "hereafter to be made," or by any other means whatsoever, such person or persons, instead of being or becoming seized thereof in fee

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tail, shall be deemed and adjudged to be and become seized thereof for his natural life only, and the remainder shall pass, in fee simple absolute, to the person or persons to whom the estate tail would, on the death of the first grantee or donee, pass, according to the course of the common law, by virtue of such gift, devise or conveyance. It is apparent, if at common law, by virtue of this conveyance, Mrs. Lehndorf would take an estate tail, whether an estate tail general, or an estate tail special, the thirteenth section would be inoperative, and by virtue of section 6 she would become seized of an estate for her life, with remainder in fee to those to whom the estate is immediately limited.

Estates tail came into general use upon construction by the courts, of the statute *de donis conditionalibus*, (13 Edw. 1, c. 1, sec. 1,) and while no extended discussion will be necessary, an examination sufficient to determine if this case falls within the rules creating an estate tail, will be proper.

To create an estate in fee simple, at common law, the grant must be to the grantee and his heirs, without limitation, to take from generation to generation, in the regular course of descent. A tenant in fee simple is defined by Blackstone to be, "he that hath lands, tenements or hereditaments, to hold to him and his heirs forever, generally, absolutely, simply; without mentioning *what* heirs, but referring that to his own pleasure or the disposition of the law." (Com. 11, 104.) Estates in fee tail were of two kinds: Estates tail general, as where the grant was to one and the heirs of his body generally, so that his issue in general, by each and all marriages, are capable of taking *per formam doni*; and estates tail special, where the gift or grant was restricted to certain heirs, or class of heirs, of the donee's body. (Blackstone's Com. 11, 113, 114; 4 Kent's Com. 11; 1 Washburn on Real Prop. *66.) In a grant of lands, words of inheritance were necessary, at common law, to the creation of a fee, but in the creation of a fee tail estate more was required. There must also be words of

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procreation, indicating the body out of which the heirs were to issue, or by whom they were to be begotten. The ordinary formula was to make the gift or grant to the donee, as the grantee was called, "and the heirs of his body," or "her heirs upon her body to be begotten," or "upon her body to be begotten by A;" but there was no especial efficacy in these particular forms of words, and it was requisite, only, that in addition to limitation to "heirs," the description of the heirs should be such that it should appear they were to be the issue of a particular person. Blackstone's Com. 11, 114; 1 Washburn on Real Prop. *72; 2 Preston on Estates, 478, and cases cited; 2 Jarman on Wills, 325.

The necessary words of inheritance are not here wanting to create a fee simple, or fee tail, at common law. The grant is to Mrs. Lehndorf and her heirs, and if the description had stopped here, a fee simple estate would, at common law, have passed by the deed. The grant is not, however, to her and her heirs *simpliciter*, but to her and her heirs by a particular husband, and by necessary implication excludes the construction that heirs generally were intended. Heirs, generally, would include not only those designated, but children she may have or have had by any other husband, as well as collaterals. Who, under the law, could be her heirs by her present husband except her children by him begotten? If the word "begotten" had been introduced before the preposition "by," so as that it would have read, "her heirs begotten by her present husband," etc., it would have been no more certain that the issue of her body was intended. If it be conceded that equivalent words, which, by necessary implication, describe and designate the particular body out of which the heir should proceed, would suffice to create an estate tail at common law, which seems to be done by the cases and text-writers, then the conclusion seems irresistible that such an estate was here created. "Her heirs by her present husband," could be no other than the issue of her body by him begotten. No other person, or class

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of persons, would answer the description, and they would and do fill it in every particular.

This precise point was ruled in *Wright v. Vernon*, 2 Drewry, 439, where it is said: "The effect, therefore, of a limitation 'to the right heirs of Sir Thomas Samwell, by a particular wife, forever,' is precisely the same as that of a limitation to the heirs of his body by that particular wife, forever. The words, 'of his body,' are not in the least degree necessary to this construction of the term 'heirs,' or 'right heirs,' because without their insertion the full and absolute effect of them is involved in the description, 'his right heirs, by Mary, his second wife,' which description limits the meaning of the term 'heirs' to heirs special, procreated by himself, as effectually and as necessarily as the words, 'of his body,' could do if they had been added." This was a case, it is true, arising upon a devise, in respect of which much greater latitude of construction is allowable than in the construction of deeds; but that consideration can in no way affect the weight of the authority upon the matter being considered.

It follows, that Mrs. Lehndorf would, at common law, be seized, by virtue of this conveyance, of an estate tail special in the lands conveyed, and therefore, under the statute, would take an estate for her life only, and that, by virtue of the statute cited, the remainder vested in fee in her children by her said husband, *in esse* at the time of making the deed, subject possibly, however, to be opened to let in after-born children of the same class. If no issue of her body "by her present husband" had been then living, the remainder would have fallen under Fearne's fourth and Blackstone's first definition of a contingent remainder, *i. e.*, when the remainder is limited "to a dubious and uncertain person." But here, at least two of the children who would, under the statute, take the fee simple estate upon the determination of the life estate, were in being when the deed was executed and delivered, and the remainder vested immediately in them in fee, subject to the

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possible contingency of being divested *pro tanto*, if opened to let in after-born children answering the same description. The person to whom the remainder is limited is ascertained, the event upon which it is to take effect is certain to happen, and although it may be defeated by the death of such person before the determination of the particular estate, it is a vested remainder. "It is the uncertainty of the right of enjoyment which renders a remainder contingent,—not the uncertainty of its actual enjoyment." 2 Blacks. Com. 169; Fearne on Rem. 149; Kent's Com. 203; 2 Sandf. C. R. 533; *Hawley v. James*, 5 Paige, 467; *Moore v. Lyons*, 25 Wend. 144.

But it is said that the rule in *Shelley's case* should be applied; but it will be seen that its application will produce the same result. That rule, as formulated in 2 Jarman on Wills, page 332, will best illustrate the position here. It is: "The rule simply is, that where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs, or the heirs of his body, the word 'heirs' is a word of limitation,—*i. e.*, the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee tail; if to his heirs general, a fee simple." The rule operates upon the words of inheritance without affecting the words of procreation, so that if, in any case, the words, "heirs of his body," or other equivalents sufficient to create an estate tail, are used, a fee tail is vested in the first taker, and not the fee simple, as seems to be supposed. Therefore, if the rule be applied, Mrs. Lehndorf would, at common law, be seized of an estate in fee tail, and brought directly within the terms of section 6 of the Conveyance act, before cited. When, therefore, Mrs. Lehndorf, joined by her husband, mortgaged the land to Humphrey, it was not in her power to incumber the fee, and that estate passed to and vested in her two children then living, unincumbered by the lien created by the mortgage.

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But it is said this mortgage was given for the purchase money of the land, and that in some way, not clearly defined in argument, a lien therefore exists upon the estate conveyed. If it is intended thereby to insist that a vendor's lien exists, the answer to such a contention would be three-fold. A vendor's lien upon real estate is a creation of the courts of equity, upon the equitable consideration that where the vendor has taken no security for the purchase money, and done no act showing an intention to waive the lien, it is presumed that it was not the intention of the parties that one should part with and the other acquire the title without payment of the purchase price of the land. It exists, if at all, independent of any contract, is personal to the vendor, and whenever, from the circumstances, the court can infer that he did not rely upon the lien at the time of the sale, or subsequently abandoned it as security, it will be held to be waived. (Pomeroy's Equity; *Cowl v. Varnum*, 37 Ill. 184; *Richards v. Leaming*, 27 id. 432.) Thus, taking an independent security will discharge the lien. *Conover v. Warren*, 1 Gilm. 432.

It is manifest that when the deed, and mortgage back to secure the purchase money, are parts of a single transaction, as in this case, one estate may be conveyed by the deed and a wholly different interest conveyed by the mortgage,—as, if the fee be granted by the deed, and an estate for life or for years mortgaged. The power of the parties to so contract can not be questioned. If the vendor saw proper to take security by mortgage upon less than the whole land, or upon less than the estate conveyed, for the unpaid purchase money, there is no reason why it would not be a valid contract, and the residue of the land or estate pass by the deed, unincumbered by any lien in his favor.

But the bill in this case is for foreclosure of the mortgage given to secure the purchase money, and proceeds upon the theory that in equity the mortgage attached to and became a lien upon the fee which is alleged to be in Mrs. Lehndorf, and

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is to enforce the security under the contract,—a theory wholly inconsistent with the preservation of a vendor's lien. Again, as before said, the lien created by implication in favor of the vendor is personal to him, and is not assignable or transferable, even by express contract between the vendor and an assignee. It can be enforced only by the vendor himself. (*Richards v. Leaming, supra; Keith v. Horner, 32 Ill. 524; McLaurie v. Thomas, 39 id. 291; Markoe v. Andras, 67 id. 34; Moshier v. Meek, 80 id. 79.*) This is an established rule in equity, and is an insuperable obstacle to the enforcement of a vendor's lien by defendant in error. Such liens are secret, often productive of gross injustice to others dealing in respect of the property to which they attach, and courts of equity will not extend them beyond the requirements of the settled principles of equity.

But it is said that the deed and mortgage being parts of the same transaction, the title would not vest as against the purchase money, and the principle so often announced by this and other courts, that in such case there is no interregnum between the effective operation of the deed and mortgage in which judgment liens and the like can attach, as against the mortgage security, is sought to be invoked. The doctrine can have no application to the facts of this case. It is true, as so often held, that in the case stated, the making and delivery of the deed and mortgage being simultaneous, and parts of one transaction, are to be construed as one act; *eo instanti* upon the delivery of the deed the mortgage becomes effective, and the title passes to the mortgagor, subject to the lien of the mortgage. The mortgage attaches to the title conveyed in its transmission from the vendor to the vendee, and, obviously, is effective in arresting the passage of the title so far only as it reconveys the estate to the original vendor. Therefore, if, by deed, a life estate is conveyed to one and the fee to another, and, as part of the same transaction, the life estate is mortgaged by the grantee thereof to the grantor, the mort-

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gage would attach to the life estate, and the life tenant would take subject to the lien, and the fee would pass unaffected by the mortgage.

It is also insisted that the children of Mrs. Lehndorf are mere volunteers, who paid nothing, and therefore, in equity, their interest should be subjected to the payment of this purchase money. We know of no recognized principle of equity by which the case can be affected by that consideration. If it be conceded they paid nothing, it is apparent defendant in error has no such equity as should prevail against their title. It is not enough that they are not purchasers for value,—the party questioning their title must show himself legally or equitably entitled to the relief. When defendant in error purchased the notes of Humphrey, he had notice, by the record, of the state of the title, and that the mortgagor, in the mortgage given to secure them, had a life estate only in the lands mortgaged. He must be presumed to have known that the mortgage conveyed, subject to the condition of defeasance, the life estate of Mrs. Lehndorf, only, and also that the assignment of the notes, or of the notes and mortgage, could not transfer to him any equitable lien Humphrey might have had upon the fee in the land for the unpaid purchase money.

Two thousand dollars of the consideration was paid at the execution and delivery of the deed, but by whom does not appear. If the children paid nothing, it was neither unlawful nor immoral for the parents, or either of them, to provide for the future welfare of their offspring by purchasing this land and having the fee deeded to them, if done without fraud as to existing creditors, and with the knowledge and consent of their grantor. No fraud is alleged or shown, nor is it shown that the mortgage upon the life estate of Mrs. Lehndorf was or is inadequate security for the money remaining unpaid to defendant in error; but if it was, it could make no difference, as we have seen it is not purchase money in his hands, in any sense, in which a lien can be enforced in equity, otherwise than

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by a foreclosure of the mortgage upon the estate and interest of which Mrs. Lehndorf was seized,—that is, her life estate in these lands.

It appears by the bill that the deed was made to Mrs. Lehndorf and her heirs by her present husband, etc., at her request. The grantor had full knowledge of the grant, and took back a mortgage to secure the unpaid purchase money, executed by Mrs. Lehndorf and her husband, only. Defendant in error purchased the notes with notice of the facts as disclosed by the record, and if he must lose because of the inadequacy of his security, he can not complain.

The decree of the circuit court will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

THE PEOPLE *ex rel.* McCracken

v.

CLOVIS SOUCY.

Filed at Mt. Vernon June 20, 1887.

1. **APPEAL**—*reviewing the facts.* It can not be assigned for error in this court that the Appellate Court found the facts of a case to be substantially as presented by the record at a former term. Such finding as to controverted facts is not subject to review in this court.

2. **SAME**—*reciting the facts by the Appellate Court.* The provisions of the statute requiring the Appellate Court, in cases where its judgment is the result of its finding the facts differently from the trial court, to recite in its final order or judgment the facts as found, is sufficiently complied with by a recital that the facts are substantially the same as they were in the record when before the court at a former term. The facts will be understood as those relating to the point made on the former hearing.

3. The Appellate Court, in its final order, found "that the facts are substantially the same as they were in the record when the cause was before this court at a former term, and that the same effect is to be given

Brief for the Appellant.

them as the Supreme Court determined in said cause should be given to them when that court decided the same," etc.: *Held*, that this is not an assumption that this court had settled the questions of fact by its decision. It amounts to a statement that the Appellate Court allows the same effect to be given to the facts which this court did.

APPEAL from the Appellate Court for the Fourth District;— heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. Amos Watts, Judge, presiding.

Mr. R. A. HALBERT, and Mr. M. MILLARD, for the appellant:

When the Appellate Court reverses a judgment upon a finding of the facts differently from what the circuit court found them, it must "recite" or set them out in the final order. This evidently means they shall be spread upon the record, in order that this court may see in what respects the findings differ, and upon what basis the judgment of reversal is made to rest. The statute says the facts as found must be recited in the final order. Practice act, sec. 87.

This court has held in a number of cases that the requirement of the statute is imperative. *Tenney v. Foote*, 95 Ill. 107; *Tibballs v. Libby*, '97 id. 552; *Coal Co. v. Peck*, 105 id. 529; *Brown v. Aurora*, 109 id. 165; *Williams v. Forbes*, 114 id. 167; *Anderson v. Fruitt*, 108 id. 378.

That court having failed to find the facts, the rule will be applied as laid down in the following cases: *Brant v. Lill*, 96 Ill. 608; *Coal Co. v. Peck*, 98 id. 139; *Thomas v. Insurance Co.* 108 id. 91.

The Appellate Court was wrong in assuming this court had settled the controverted questions of fact. *People v. Soucy*, 113 Ill. 109; *Chickering v. Failes*, 29 id. 294; *Elston v. Kenicott*, 52 id. 272; *Mohler v. Wiltberger*, 74 id. 163; *Manufacturing Co. v. Wire Fence Co.* 119 id. 30.

Messrs. KOERNER & HORNER, for the appellee.

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Mr. CHIEF JUSTICE SHELDON delivered the opinion of the Court:

This was an information in the nature of a *quo warranto*, by the State's attorney of the county, on the relation of Nicholas McCracken, charging the defendant with unlawful usurpation of the office of supervisor of the village of Cahokia. A judgment of ouster against the defendant, affirmed by the Appellate Court for the Fourth District, was reversed by this court at a former term. (*Soucy v. The People ex rel.* 113 Ill. 109.) Upon a re-trial in the circuit court there was again judgment against the defendant, which was reversed by the Appellate Court, and this appeal taken by the plaintiff.

The finding of the Appellate Court in its final order was as follows: "That the facts are substantially the same as they were in the record when the cause was before this court at a former term, and that the same effect is to be given them as the Supreme Court determined in said cause should be given to them when said Supreme Court decided said cause and filed its opinion therein, reported in volume 113, Illinois Reports, page 109. And said Supreme Court having therein determined that said facts do not show that the appellant, Soucy, had usurped the said office, we hold the same way herein."

The errors assigned are, first, the Appellate Court erred in not setting out the facts as found by it, in the final order; second, in assuming that this court had determined and adjudged the controverted facts in the case; third, that the Appellate Court erred in saying the testimony on the two trials was substantially the same, the fact being it was totally different, that on the last being overwhelming as to the fairness and legality of McCracken's election.

The provision of the statute is, that if the judgment of the Appellate Court shall be the result of the finding of the facts differently from the trial court, it shall recite in its final order or judgment the facts as found. In the circumstances of the

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present case, we think there was here a sufficient compliance with this requirement of the statute. The question of the election of which one, McCracken or Soucy, turned upon the counting of three certain ballots, which, instead of being deposited at the front window, where the other ballots were, were received at the back door of the polling place, and not put in the ballot-box. Counting these three ballots, Soucy was elected by one majority. Attempt before was made by the relator to show that these ballots were deposited by unqualified voters; but this court held he ought not to be permitted to do so, as it appeared that it was through the force and violence of the relator or his adherents at the polls that these three persons were prevented from voting at the front window, where their qualifications to vote might have been passed upon by the judges of election, and were compelled to go to the back door and have their ballots received there by one of the judges; and when the Appellate Court say, in their finding, that the facts are substantially the same as they were before, we understand them to find this fact of prevention of voting at the regular place by force and violence.

As to the Appellate Court being wrong in assuming that this court had settled the controverted questions of fact by its former decision, we do not perceive that there is any such an assumption, but that the Appellate Court allow the same legal effect to the facts which this court did.

As to the alleged error in the Appellate Court's finding that the facts are substantially the same as they were before, that is not subject to our review.

The judgment of the Appellate Court is final as to the matters of fact. The judgment of that court must be affirmed.

Judgment affirmed.

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THE BOARD OF EDUCATION OF THE STATE OF ILLINOIS

v.

JULIA A. BAKEWELL.

Filed at Springfield January 24, 1887.

122	339
149	605
122	339
182	162
182	166
122	339
207	*859
j207	*868
j207	*869

1. NORMAL UNIVERSITY—whether a *State institution or a private corporation*. The Normal University located at Normal, in this State, is not a public State institution, but is a private eleemosynary corporation, and it can not be deprived of its property by mere legislative enactment intended to transfer the same to another without due process of law.

2. ESTOPPEL—of *private corporation to assert its real character in that regard*. Where the charter of a private corporation contemplates its establishment and maintenance by charitable donations, the acceptance of appropriations by it from the State, even though made by the State under the belief that such corporation is a State institution, will not operate to estop it from asserting its rights of property as a private corporation.

3. CONSTITUTIONAL LAW—“due process of law”—power to legislate the property of one into the hands of another. The phrase, “due process of law,” in the constitutional clause that “no person shall be deprived of life, liberty or property without due process of law,” means, in due course of legal proceedings according to those rules and forms which have been established for the protection of private rights. An arbitrary act of the legislature taking one person’s property and giving it to another, is not “due process of law.”

4. SAME—exercise of judicial powers by the legislature. To ascertain whether a deed is conditional, and whether there has been a breach of the condition, and to enforce forfeiture for the breach if found to have occurred, call for the exercise of judicial functions which it is not within the competency of legislative power to exercise.

5. CORPORATION—franchise, how lost. A private corporation created by the legislature may lose its franchises by a *mis-user* or a *non-user* of them, and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain if there be grounds for a forfeiture, but not by mere legislative enactment.

6. The franchises and property of a private corporation not organized for pecuniary profit, will not be held to have been lost or surrendered to the State through expressions of mistaken legal opinion by its officials, or by the acceptance of legislative donations to such corporation.

7. TRUST—*private charitable corporation*. A private charitable corporation formed for the purpose of receiving donations for the establishment and maintenance of a normal university, and the education of teachers

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for the common schools, will be a trustee of the property acquired by it, to be held and administered for the special purpose of the charter. In such case the donors of its property, as well as those to be educated, will have an interest in the faithful execution of the trust, and the courts will not allow an abuse of the trust or the diversion of the trust property to other purposes than those to which it has been devoted.

APPEAL from the Circuit Court of McLean county; the Hon. N. J. PILLSBURY, Judge, presiding.

Mr. JAMES S. EWING, for the appellant.

Mr. H. SPENCER, Mr. R. E. WILLIAMS, and Mr. A. G. KARR, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

On February 18, 1857, the General Assembly of this State passed "An act for the establishment and maintenance of a normal university," whereby certain named persons and their successors were created a body corporate and politic, to be styled "The Board of Education of the State of Illinois." (Laws of 1857, p. 298.) The 5th section of the act provided for the appointment of an agent who should visit the cities, villages and other places in the State which might be deemed eligible for the purpose, to receive donations and proposals for the establishment and maintenance of the normal university, and gave power to the board to fix the permanent location of such university at the place where the most favorable inducements were offered for that purpose. On February 25, 1858, Edwin W. Bakewell, and Julia A. Bakewell, his wife, who joined in the deed for the purpose of relinquishing her inchoate right of dower, conveyed to the Board of Education of the State of Illinois forty acres of land immediately adjoining the university grounds. The only condition contained in the deed was the following: "Provided the Normal University, under the control of the said Board of Education of the State of Illinois, shall forever remain where now located." On February 9,

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1860, the said Edwin W. Bakewell and his wife united in another deed to the said Board of Education of the State of Illinois, which, after reciting the execution of the former deed, and the condition therein, contained the following:

"And whereas, the said Edwin W. Bakewell, and Julia A. Bakewell, his wife, are willing and anxious to vacate and annul said condition to said deed, and to make the title of the said Board of Education of the State of Illinois to the said land conveyed by said deed, become and be absolute in fee simple; now, therefore, this indenture, made and entered into this 9th day of February, 1860, by and between the said Edwin W. Bakewell, and Julia A. Bakewell, his wife, and the said Board of Education of the State of Illinois, witnesseth, that they convey a full and complete and unconditional title, in fee simple, in and to the said forty acres."

The university still remains established where it was at the time of the making of the first deed.

The General Assembly, by a joint resolution passed in 1883, by a majority of a quorum only, directed that the State Board of Education execute a conveyance in fee simple of the said forty acres of land to Julia A. Bakewell. This joint resolution recites, in its preamble, that the land was deeded, in 1858, upon certain conditions to be fulfilled by the board of education, and that said conveyance was conditional, dependent for its validity upon the performance of said conditions, and that the conditions had not been complied with. The board of education refused to comply with the direction, and at its session in 1885, the General Assembly, again by a joint resolution passed by a majority of a quorum, declared that the title to said forty acres of land should be and was thereby declared vested in Julia A. Bakewell. A demand for the possession of the property was made upon the board, and refused. Thereupon, Julia A. Bakewell filed a petition in the circuit court of McLean county for a writ of *mandamus* commanding the Board of Education of the State of Illinois to execute a deed to her

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for the said forty acres of land. • The cause was tried by the court without a jury, and a peremptory writ of *mandamus* was awarded. The defendant appealed.

Two questions are made upon this record: Whether the legislature had the constitutional power to order the conveyance of this forty acres of land to be made to Julia A. Bakewell; and if so, whether it could exercise such power by a joint resolution.

As to the character of the Board of Education of the State of Illinois, in the respect of its being a public or a private corporation, this ground was most fully gone over by this court in the case of this same *Board of Education v. Greenebaum & Sons*, 39 Ill. 610, and the character of the corporation declared, and we need in this regard but to refer to that decision. That was a proceeding brought against this board of education to enforce a mechanic's lien for work and labor done upon the university building. The contract was made in 1860, and the decision rendered in 1864. It was said in the opinion: "The principal objection to the recovery in this case, and the one most pressed, is, that the board of education is a corporation founded by the State, and supported by the funds of the State, and that its property is the property of the State, and therefore not subject to a mechanic's lien. To determine the force of this objection, the act of 1857 must be considered, and the additional act of 1861." The latter act was one entitled "An act to refund the interest on the college or university fund, and appropriate the same for the use of the State Normal University." After recapitulating in detail all the several provisions of these two acts, it was further said:

"From this legislation the plaintiffs in error insist that the property of the Normal University is the property of the State, in which the corporation have no interest whatever; that it was erected for certain public purposes in which the whole State has an interest, and certain rights secured to each county in the State. * * * The counsel also insists that the legislature have the absolute right to repeal or modify the charter,

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and that, from the act of 1861, it is manifest it was not the intention of the legislature that the property held in the name of the board should be sequestered and sold by creditors or others,—that the corporation is a mere trustee or agent of the State, to carry out the wishes and intention of the legislature," etc. And after stating that the court's view of this legislation differed materially from that of plaintiff's in error, and that it had not been able to find in either of these acts any provisions on which to base such a view as that of plaintiff's in error, or any power reserved to the legislature to repeal or modify the charter, the opinion proceeds :

"We regard this university as an eleemosynary institution, founded for the purpose of the gratuitous distribution of knowledge of the art of teaching and conducting common schools, and erected, not at the expense of the State, but of individuals. An agent was to be appointed by the corporation to visit the different cities, villages and other places in the State deemed eligible for the purpose, to receive donations and proposals for the establishment and maintenance of the university, and its permanent location was to be fixed at the place where the most favorable inducements were offered for that purpose. The salaries of the instructors and other employes are fixed by the board, and no appropriation has ever been made from the State treasury for its maintenance. This is one feature which distinguishes it from our State institutions, properly so called, such as the asylum for the blind, etc. It is true the State applied the interest of the university and seminary fund to aid in maintaining this university, but that interest did not belong to the State. The State held it as a mere trustee, under the compact with the general government, and it was specially devoted by that compact to a college or university. The act of 1857 expressly provides that no part of this fund should be applied to the purchase of sites or for buildings for this university. * * * This building, with the ground upon which it was erected, was a free gift by charitable in-

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dividuals to the corporation, not to the State, and there can not, therefore, exist any obligation on the part of the State to defray any of the expenses attending its erection. Its whole history shows it to be the result of private munificence."

As said by Blackstone, corporations of the eleemosynary sort are such as are constituted for the distribution of the free alms or bounty of the founder of them to such persons as he has directed,—of which kind are all hospitals for the maintenance of the poor, sick and impotent, and all colleges. 1 Blackstone's Com. 471.

Mr. Justice STORY, in his opinion in the case of *Dartmouth College v. Woodward*, 4 Wheat. 669, says: "Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties, and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder or the nature and objects of the institution. * * * This reasoning applies in its full force to eleemosynary corporations. A hospital founded by a private benefactor is, in point of law, a private corporation, although dedicated by its charter to general charity. So a college," etc. It is only a public corporation, and not a private eleemosynary corporation, as appellant has been adjudged by this court to be, which is liable to the control of the legislature.

It is conceded by appellee's counsel, as it must be, that originally appellant was a private corporation, but it is said that after the decision in the *Greenebaum case*, by the acts of the Board of Education and the legislature of the State, the character of the institution became changed from that of a

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private corporation to a State institution and a public corporation, under the paramount control of the legislature. The acts of the Board of Education which are relied on in this regard, are three exhibits, "A," "B" and "C," to the petition, and the acceptance by the board of appropriations made to it by the legislature. It is said that by these exhibits appellant offered to make surrender of its corporate franchises, and urged the State, through and by the legislature, to accept such surrender, which the legislature did accept.

The second section of the act of 1857, for the establishment and maintenance of the university, provides that "the Superintendent of Public Instruction, by virtue of his office, shall be a member and secretary of said board, and shall report to the legislature, at its regular sessions, the condition and expenditures of the Normal University, and communicate such further information as the said Board of Education or the legislature may direct."

These exhibits are three reports, made, as stated therein, in pursuance of such requirement, through the secretary of the board, dated, respectively, December 20, 1860, December 17, 1862, and December 14, 1864, and signed, the first by thirteen, the second by ten and the last by seven, of the fifteen members of the board. They make report of the condition and expenditures of the university, contain solicitations of aid from the legislature, and set forth reasons and arguments in support of such solicitations. For example, in the second report is the following:

"The act for the establishment and maintenance of a normal university was passed February 18, 1857. By the various provisions of that act, as also by the provisions of the subsequent act of the legislature passed February 14, 1861, entitled 'An act to refund the interest on the college and university fund, and to appropriate the same for the use of the State Normal University,' the Normal University is made a State institution. It is under the sovereign control of the leg-

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islature, and the corporation are the trustees and agents of the State, with only such powers as have been conferred by the legislature, and these powers constantly liable to be modified or limited, as was done by the act last mentioned. The corporation have no personal or pecuniary interest in the trust or property, and the corporation may properly be classed among the public eleemosynary corporations of the State." "The State, by the act of February, 1861, have assumed entire control over all the property acquired by the board, and have forbidden the sale or incumbrance of the property. The State has assumed, and properly, too, complete jurisdiction over the entire institution and property." "There is already a decree for a mechanics' lien in the McLean circuit court, in favor of Greenbaum & Sons, for nearly \$9000, and they threaten to sell, by virtue of said decree, the property of the board, which is the property of the State. The board possesses no means to prevent judgments and decrees from being had against us, nor a sale of the property, if the property of the State can be sold by virtue of a decree or execution, of which the board entertain great doubt." "The corporators have no interest in this property. It is the property of the State, as much as is the capitol at Springfield." "The legislature has seen proper to deprive us of the right to sell or dispose of any property belonging to the State, for any purpose whatever; therefore, the maintenance and destiny of the institution are entirely in the hands of the legislature." And earnest appeals are made to the legislature for financial aid.

This is the purport of all that these reports contain as affording evidence of a surrender of corporate franchises. What is said in them touching the character of the corporation, and the ownership of its property, is but an expression of the opinion of members of the board upon the legal effect of the acts of 1857 and 1861, and which is at variance with the decision of the Supreme Court. Surely this expression of legal opinion by the Superintendent of Public Instruction, and

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others signing these papers with him, that the corporation was a public eleemosynary corporation, and that its property was the property of the State, did not make them such. These documents, so far from evidencing any surrender of corporate franchises, show the exact reverse. They look to the continuance of the exercise of such franchises, and ask for means to enable the board, with the more efficiency, to carry out the objects for which the corporation was created. To make of these reports anything of the character of a surrender, or offer of surrender, of appellant's corporate franchises, is to distort them into something which they palpably are not.

On February 28, 1867, the General Assembly passed an act entitled "An act concerning the board of education, and the Illinois Natural History Society," sections 1 and 2 of which are as follows:

"Sec. 1. The State Normal University, established by an act approved February 18, 1857, is hereby declared a State institution, and the property, real, personal and mixed, in the hands and standing in the name of the Board of Education of the State of Illinois, is the property of the State of Illinois, and is by said board held in trust for the State.

"Sec. 2. Said board of education is hereby authorized to sell and dispose of the out-lands and lots standing in the name of said board, lying in the counties of Jackson, Woodford and McLean, except the site of the Normal University, and the farm of one hundred acres, more or less, in its immediate vicinity, and to appropriate the proceeds thereof towards the payment of the appropriations hereinafter named."

The residue of the act but makes some small appropriations to the university. (Laws of 1867, p. 21.) By the act of 1861 the board was prohibited from selling or incumbering its property.

This act of 1867 is relied on by appellee's counsel as an acceptance of the surrender of the corporate franchises of appellant, supposed to have been made by the aforesigned reports.

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The act is as deficient in showing an acceptance of such a surrender, as are the documents named in showing a surrender. There is no intimation whatever in the act, of such surrender or acceptance. The act is a simple seizing of the property of the corporation into the hands of the State. In the way of this is the constitutional provision that "no person shall be deprived of life, liberty or property without due process of law." As said in *Westervelt v. Gregg*, 2 Kern. 209: "Due process of law undoubtedly means, in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights. Such an act as the legislature may, in the uncontrolled exercise of its power, think fit to pass, is in no sense the process of law designated by the constitution."

It is a provision of the constitution of 1870, that "the State shall never pay, assume or become responsible for the debts or liabilities of, or in any manner give, loan or extend its credit to or in aid of, any public or other corporation, association or individual." (Sec. 20, art. 4.) It is said that since the constitution of 1870 went into effect, there has been appropriated \$278,186 for and on account of the Normal University, out of the State treasury, exclusive of the moneys arising from the "Seminary fund;" "and having accepted these appropriations, the board of education is estopped, by its own acts, to say that it is a private corporation, and that the Normal University, and the property standing in the name of the board, is the property of a private corporation, and is estopped to question the validity of the act of 1867, declaring this property to be the property of the State." The making of these appropriations might be evidence that the legislature, at the time, considered appellant to be a State institution, and that the act of 1867, taking away from it its property and vesting it in the State, was a valid enactment,—and this we conceive is all the significance there is in respect of these appropriations. What appellant indeed was, in the respect of being a

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State institution or a private corporation, depended upon what the charter of its creation made it to be, and not what the legislature may have, at some time afterward, considered it to be. And so as to the validity of the act of 1867, the legislative opinion in that regard would not govern, but the constitutional power to pass the law. Appellant's act of incorporation contemplated that the university was to be established and maintained by charitable donations, and we do not see why it might not well accept these appropriations made to it, and yet stand upon all its chartered rights,—why, from such acceptance, appellant should be held to be narrowed down to that view of its rights which the legislature may be supposed to have entertained when making the appropriations. The appropriations were made as a free gift, untrammeled with any condition, and we can not think that from their acceptance there was the yielding of any right. We perceive no element of estoppel in the matter.

It is said the action of the legislature in the passage of the law of 1867 was not questioned by the board; that, on the contrary, it received the public funds appropriated by that act and since, and must be treated, as between itself and the State, as consenting to the said enactment, even if its consent did not expressly appear. There was never occasion to question such action of the legislature until the time of the present suit. The declaration of the act of 1867, that the State Normal University was a State institution, and that the property of appellant was the property of the State of Illinois, stood a mere harmless declaration upon the statute book, having no effect. But so soon as there was the first attempt to put the declaration in force, by bringing this suit, resistance was made. From the first, appellant was a constant suppliant before the legislature for pecuniary aid, and there were appropriations made to it from the State treasury, as well before as after the act of 1867. Appellant should not have the title to \$200,000 of property,—the amount its reports showed it to

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possess,—taken away from it upon such a ground as thus suggested.

We have thus adverted to what is insisted upon, as showing that *after* the decision in the *Greenebaum case*, by the joint action of the board of education and the legislature, appellant did become a public corporation, and the Normal University a State institution. We do not find that since that decision there has been any change effected in the character of this corporation. As it was then adjudged to be a private eleemosynary corporation, we find that it still remains such. It is true that at the time of that decision it was found that no appropriation had been made to the university from the State treasury, and that since then there have been made such appropriations. But this we consider an unimportant circumstance. The foundation of the university, which was the first gift of the revenues, was private, and this, with the charter, fixes the character of the corporation as private, notwithstanding there may have been subsequent appropriations to it from the State treasury.

The joint resolution directing the conveyance of this land to Julia A. Bakewell, puts forth in its justification that the conveyance by E. W. Bakewell and wife to the board of education was a conditional conveyance, and that the conditions upon which its validity depended had never been complied with. To ascertain that a deed is conditional, that there has been a breach of condition, and to enforce forfeiture for the breach, are judicial functions, which it is not within the competency of legislative power to exercise. This \$200,000 of property, the donations of private donors, was owned by this private corporation of the Board of Education of the State of Illinois by an indefeasible title, of which it could not be divested without the default or consent of the corporators. A private corporation, created by the legislature, may lose its franchises by a *mis-user* or a *non-user* of them, and they may be resumed by the government under a judicial judgment upon a *quo warranto*.

Opinion of the Court.

to ascertain and enforce a forfeiture. (*Terrett et al. v. Taylor et al.* 9 Cranch, 51.) But we can not recognize that they may be lost, here, by expressions of mistaken legal opinion by members of the board, or by the acceptance of legislative donations made to the corporation. In respect of consent, there is no claim of anything more than an implied consent, by appellant to the deprivation of its property, arising from the reports made which have been alluded to, and the accepting of appropriations to it from the State treasury.

But there can be no pretence of anything of assent to misappropriation of the property. In this respect the board has been strictly faithful to its trust. In their second report above named they say: "And it is the duty of the legislature to see and to know that the great object of the creation of the university is accomplished; that the trustees of the institution faithfully discharge all the duties imposed upon them; that the property of the institution, which is the property of the State, is carefully preserved, not misappropriated or permitted to be sequestered by judgments, nor upon any pretence whatever."

It would seem to be supposed, here, that the corporation and the legislature together had the right of absolute disposition of this corporate property. But there are other rights and interests than of these bodies here involved. Appellant is but a trustee of this property, to hold and administer it for the special purpose named in its charter,—the education of teachers for the common schools. The benefactions were devoted by the donors to this special purpose, and can be applied to no other. Appellant stands here as representing the donors, and their rights are to be defended and maintained by it. And so with respect to those who are to derive learning from this source, appellant is a trustee for them also. Religion, charity and education are, in the law, legatees or donees, capable of receiving bequests or donations in this form. (*Dartmouth College v. Woodward*, 4 Wheat. 643.) Before the courts, it will not be suffered that

Syllabus.

there shall be any abuse of the trust, and it will be seen to that the property shall not be diverted from the object to which it was devoted by the donors. To take this property in question from the Board of Education of the State of Illinois, and give it away to Julia A. Bakewell, would be a clear perversion of the trust upon which the property is held. For the accomplishment of this purpose the writ of *mandamus* is sought, and it should have been denied.

It becomes unnecessary to consider the other question, whether, had the power of the legislature to order the conveyance existed, it was exercised in a legal mode.

The judgment will be reversed, and the cause remanded.

Judgment reversed.

SCOTT, SCHOLFIELD and SHOPE, JJ., dissenting.

JOHN S. BARTON

v.

THE FARMERS AND MERCHANTS' NATIONAL BANK.

Filed at Mt. Vernon September 26, 1887.

122	352
38a	264
122	352
142	599
122	352
80a	*100

1. **USURY—agreement to pay attorney's fee—penalty for non-payment at maturity, in excess of legal rate of interest.** Section 6, of chapter 74, of the Revised Statutes, entitled "Interest," after fixing the rate of interest which might be contracted for, at eight per cent, provides: "And all contracts executed after this act shall take effect, which shall provide for interest or compensation at a greater rate than herein specified, on account of non-payment at maturity, shall be deemed usurious, and only the principal sum due thereon shall be recoverable."

2. Under this statute, all penalties for non-payment at maturity, whether as additional interest or as compensation for the use of money, in excess of the legal rate of interest, are prohibited; but an agreement in a promissory note that, in the event the note is not paid at maturity, and shall be placed in the hands of an attorney for collection, the maker will pay a specified sum as attorney's fee, the sum so stipulated to be paid not being

Statement of the case.

interest or compensation on account of the non-payment of the principal sum and interest reserved, but intended only as indemnity to the creditor against actual loss from the failure of the debtor to keep his agreement, is not within the inhibition of the statute, notwithstanding the amount stipulated to be paid as such attorney's fee, in addition to the rate of interest reserved, would exceed the legal rate allowed to be contracted for as interest.

3. SAME—*consideration of promise to pay attorney's fee.* In such case, the making of the loan or extending the credit would be a good consideration for the promise by the debtor of indemnity in the way of an agreement to pay an attorney's fee, as was provided.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Fayette county; the Hon. JESSE J. PHILLIPS, Judge, presiding.

This was assumpsit, upon the following promissory note:
\$300.00. VANDALIA, ILL., December 10, 1884.

"Six months after date, for value received, we, or either of us, promise to pay to the order of the Farmers and Merchants' National Bank of Vandalia, \$300, with interest at eight per cent after maturity. If this note is not paid when due, we agree to pay an attorney's fee of \$30, if placed in the hands of an attorney for collection.

JOHN S. BARTON,
W. L. BALLINGER,
BENJAMIN BUCKMASTER."

Judgment was recovered for the principal and interest, the trial court excluding the \$30 reserved for attorney's fee, although it appeared in evidence that the note was not paid at maturity, and was placed in the hands of an attorney for collection, and at the same time the fee of \$30 was paid to him by the plaintiff. On appeal, the Appellate Court reversed that judgment, and on the appeal of the defendant below the case is brought to this court. The question whether the agreement to pay the attorney's fee was usurious, is the one presented.

Briefs of Counsel. Opinion of the Court.

Messrs. WEBB & Cox, and Mr. W. M. FOGLE, for the appellant:

The promise to pay an attorney's fee renders the note usurious. The promise to pay \$30 attorney's fee is wholly without consideration, and is therefore void. *Peyson v. Cole*, 50 Am. Rep. 451; *Bullock v. Taylor*, 39 Mich. 137.

The enforcement of Barton's promise to pay the \$30 attorney's fee, is contrary to sound public policy, and is therefore void. *Thomasson v. Townsend*, 10 Bush, 114; *Garr v. Banking Co.* 11 id. 189; *Rilling v. Thompson*, 12 id. 310; *State v. Taylor*, 10 Ohio, 378; *Witherspoon v. Musselman*, 14 Bush, 214; *Dow v. Updike*, 11 Neb. 95.

Barton's promise to pay the attorney's fee is within the prohibition of section 6, chapter 74, of the statute relating to interest. *Archibald v. Moore*, 5 Bradw. 433.

Mr. R. W. HENRY, and Mr. S. A. PRATER, for the appellee:

The appellant insists that the contract for an attorney's fee included in the note in this case is void *per se*; that it is usurious, against the policy of the law, without consideration, and in contravention of section 6, chapter 74, relating to interest.

The question as to whether or not such contracts are void *per se*, has been adjudicated in several of the States, and while there is some conflict of authorities, the weight of opinion seems to be decidedly in favor of their validity. *Smith v. Silvers*, 32 Ind. 321; *Johnson v. Crossland*, 34 id. 512; *Tuly v. McClung*, 67 id. 10; *Parham v. Pulliam*, 5 Coldw. 497; *McGill v. Griffin*, 32 Iowa, 445; *Williams v. Meeker*, 29 id. 292; *Huling v. Drexel*, 7 Watts, 126; *Imler v. Imler*, 94 Pa. St. 371; *Miner v. Bank*, 53 Texas, 559; *Peyser v. Cole*, 11 Ore. 39.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

By the contract it was agreed that if the note was not paid when due, an attorney's fee of \$30 was to be paid by the maker if the note was placed in the hands of an attorney for collection.

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The declaration avers the non-payment at maturity, the placing of the note in the hands of an attorney for collection, and the payment by plaintiff of \$30, as a fee to said attorney for his services therein.

It is apparent that the cases of *Nickerson v. Babcock*, 29 Ill. 497, and *Easter et al. v. Boyd*, 79 id. 325, where it was held that an attorney's fee could not be recovered, because, by the contract, it was not due when the suit was brought, can have no application here. In this case, if recoverable at all, it became due, by the terms of the contract, when, after non-payment at maturity, the note was placed in the hands of an attorney for collection.

It is contended that the promise to pay such attorney's fee is, first, usurious; second, wholly without consideration; third, its enforcement would be contrary to sound public policy; and fourth, that it is within the prohibition of section 6, chapter 74, of the statute.

If enforcing this promise to pay an attorney's fee would directly or indirectly have the effect of giving the payee, or of requiring the payor to pay, a greater compensation for the loan, use or forbearance of the money than is allowed by law, then, unquestionably, the contract would be usurious. The law will not tolerate any shift or device to evade its provisions. The sixth section, chapter 74, provides that "all contracts executed after this act shall take effect, which shall provide for interest or compensation at a greater rate than herein specified, on account of non-payment at maturity, shall be usurious." It therefore follows, that if the \$30 stipulated to be paid is interest or compensation on account of the non-payment of the principal sum and interest reserved, then the contract would be usurious, and should be so held. On the other hand, if this portion of the contract gives to the creditor no additional interest or compensation, or provides no penalty for the non-payment of the note, but is intended only as indemnity against actual loss to the creditor from the failure of the debtor to keep

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his agreement, we are unable to perceive upon what principle he should be debarred from requiring it as a condition to the extension of the credit, or of enforcing it to an extent necessary to save himself from actual loss, in the contingency of loss occurring to him by the default of the other party to the contract.

By the statute, all penalties, whether as additional interest, or as compensation for the use of the money, are prohibited; but where, as here, no additional or new compensation is provided for, and the contract is only for such sum as the payee would be obliged to expend in compelling the maker to perform his undertaking, the statute contains no inhibition upon the power of the parties to contract that the same shall be paid by the party whose default occasions the necessity for the expenditure. In this view we are sustained by the authority of very many courts of the highest respectability.

Upon the question as to whether contracts of this nature are void, as against public policy, this court, as well as those of other States, is also fully committed. In *Clawson v. Munson*, 55 Ill. 394, *Dunn v. Rodgers*, 43 id. 261, *McIntire v. Yates et al.* 104 id. 491, and other cases, contracts of this character have been upheld and enforced by this court. The right of the parties to thus contract has been expressly recognized, and when the contract has been for such reasonable attorney's fees only as would indemnify and preserve the payee from loss, and was due at the time of suit brought, this court has in every case sustained the plaintiff's right of recovery. See, also, *Imler v. Imler*, 94 Pa. St. 71; *McGill v. Griffin*, 32 Iowa, 445; *Huling v. Drexell*, 7 Watts, 126; *Pacer v. Cole*, 11 Ore. 39; *Smith v. Silvers*, 32 Ind. 321; *Tuley v. McClung*, 67 id. 10.

Nor do we see anything in the section of the statute quoted that would change the rule. Thereby the parties are prohibited from contracting for interest or compensation to be paid to the payee on account of non-payment of the principal debt at maturity. In *Archibald et al. v. Moore*, 5 Bradw. 432, the note provided, that if it was not paid when due, it should

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thereafter draw interest at the rate of two per cent per month, as liquidated damages, and it was very properly held, that if the provision for the payment of two per cent per month if not paid at maturity was divisible from the note proper, so as that the note might be held to be untainted with usury, and the provision for the two per cent regarded as a means of insuring prompt payment of the note at maturity, the agreement to pay the two per cent per month would, nevertheless, under the statute, be usurious and unlawful. It is apparent, there the agreement fell directly within the statute.

The agreement here provides for no new or additional compensation or interest for the use of the money because of the failure to pay at maturity. It is not in the nature of a contract for additional interest, but a provision merely against loss or damage to the payee, specifically pointed out, and which will necessarily result if the debtor fails to fulfill his undertaking; and there is no reason why he may not contract to bear the loss occasioned by his own default. It is apparent that the payee must not derive any benefit from the amount agreed to be paid, and the amount contracted for must be only such reasonable sum as will save him from loss in consequence of the default of the maker. It is not pretended, here, that the amount agreed to be paid was unreasonable, or that the payee derived any benefit whatever therefrom. On the contrary, it is shown to be reasonable, and the whole amount was paid to the attorney for his services in the proceedings to collect the note.

The right of the payee to require the indemnity against loss, and the right of the maker of the note to contract to secure the payee against the same, necessarily dispose of the objection that the promise was without consideration. If, while the creditor may not contract for more than the legal interest for the use of his money, or for additional compensation or interest for the non-payment of the note at maturity, he is not debarred from requiring, as a condition to making the loan or

Syllabus.

extending the credit, that he should be secured against expense occasioned by the default of the debtor, it follows, that the making of the loan or extension of the credit would be a good consideration for the promise of indemnity by the debtor.

We see no error in the judgment of the Appellate Court, and it will be affirmed.

Judgment affirmed.

122	358
127	636
122	558
134	568
122	358
175	390

THE ILLINOIS AND ST. LOUIS RAILROAD AND COAL COMPANY ET AL.

v.

MADISON T. STOOKEY, Collector.

Filed at Mt. Vernon September 28, 1887.

1. TAXATION—rule of uniformity—as applicable to railroad property assessed by the State Board of Equalization, and other property assessed by the local assessors. The State Board of Equalization having made an assessment of certain railroad property at about its cash value, the local officer extended the tax upon the basis of such valuation. The other property in the same locality was assessed for the same year, by the local assessor, at only about one-third its cash value. The railroad company sought to enjoin the collection of so much of the tax as resulted from the excess in valuation of its property over that of individuals. The contention of the company was, that by reason of the unequal valuation it would be required to pay a tax largely in excess, in comparing actual values, of individuals in the same locality, and this in violation of the rule of uniformity prescribed in the constitution. But the relief sought was denied.

2. SAME—former decisions. The railroad company invoked in support of its contention in that regard, the rule announced in *Bureau County v. Chicago, Burlington and Quincy Railroad Co.* 44 Ill. 229, and *Chicago and Northwestern Railway Co. v. Boone County*, id. 240, that where the property belonging to individuals in a particular locality has been assessed at less than its cash value, the constitutional rule of uniformity forbids that the property of a railroad company situate in the same locality should be assessed upon any greater per cent of its value than that of individuals. Without inquiring whether the constitutional provision in question was properly applied in those cases, it was considered that it has no application to the circumstances of the present case.

Briefs of Counsel.

3. *SAME—assessments by the local assessor and by the State board—as to the respective rates.* In this case the property of the individuals was assessed by the local assessor, and that of the railroad company by the State Board of Equalization, each acting under a statute not in conflict with the constitution, and which required that all property should be assessed at its fair cash value. The mere fact that the local assessor did not comply with the law in that regard could not operate to invalidate the assessment of the State board, which was in compliance with the law.

4. *SAME—assessment by the State board—whether subject to review.* Moreover, an assessment of railroad property for taxation by the State Board of Equalization is conclusive, except where fraud has intervened.

5. *SAME—valuation of railroad property, as returned by the company—whether binding on the State board.* The State Board of Equalization, in the assessment of railroads, is not bound by the valuation fixed upon its road, etc., by the company, and a slight error in judgment on the part of the board, in the valuation of such property, there being no fraud or corruption shown, affords no ground for enjoining any part of the taxes levied on such valuation.

Appeal from the Circuit Court of St. Clair county; the Hon. AMOS WATTS, Judge, presiding.

Mr. CHARLES W. THOMAS, for the appellants:

Section 1, article 9, of the constitution, requires that when a tax is levied by valuation, it shall be levied "so that every person and corporation shall pay a tax in proportion to the value of his, her or its property." *Bureau County v. Railroad Co.* 44 Ill. 229; *Railway Co. v. Boone County*, id. 240.

Mr. R. W. D. HOLDER, State's Attorney, for the appellee:

The cases cited have no application here. Those decisions were made under a law giving an appeal from the assessment. The fact that the local assessors may assess property at one-third its cash value will not require the State board to adopt the same basis.

The objection that the State Board of Equalization increased the valuation fixed by the schedule of the lessor of appellant, is entitled to no consideration. This court has repeatedly held that the assessor, or other body that has been provided by the

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legislature for fixing the valuation of property for the purpose of taxation, has the sole and only authority to fix such valuation. *Spencer v. People*, 68 Ill. 312; *Railroad Co. v. Surrell*, 88 id. 535; *People v. Iron Co.* 89 id. 116; *Insurance Co. v. Pollak*, 75 id. 292; *Humphreys v. Nelson*, 115 id. 45; *Mix v. People*, 116 id. 265; *Railway Co. v. People*, 119 id. 182.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

On the 7th day of August, 1886, the Illinois and St. Louis Railroad and Coal Company exhibited its bill in the circuit court of St. Clair county, against Madison T. Stookey, treasurer and *ex officio* collector of said county, to enjoin him from collecting a portion of the taxes of 1885, which had been assessed against the complainant, as assignee of the Venice and Carondelet railway. The circuit court sustained a general demurrer to the bill, and entered an order dismissing the same, to reverse which this appeal is brought.

The bill shows that the railway in question lies within the townships of East St. Louis and of Centerville Station, in St. Clair county, and it is charged that the taxes for the year 1885 are based upon an assessment of the road by the State Board of Equalization at a fraction over its full cash value, whereas all other property within these townships not assessed by the State board, was valued and assessed by the town assessors, for the same year, at about one-third its cash value, and that the same was taxed upon that basis. Such being the facts, it is contended that the tax, to the extent complained of, is violative of the provision of the constitution requiring uniformity in taxation, and in support of this view the cases of *Bureau County v. Chicago, Burlington and Quincy Railroad Co.* 44 Ill. 229, and *Chicago and Northwestern Railway Co. v. Boone County*, id. 240, are cited.

Without stopping to inquire whether the constitutional provision in question was properly applied in those cases, it is

Opinion of the Court.

sufficient to say, that, in our opinion, it has no application to the circumstances of the present case. There is no claim, nor is there any ground for the claim, that the provisions of the statute governing assessments, whether made by town assessors or the State Board of Equalization, are in conflict with the constitution. The statute requires all property to be valued and assessed, for purposes of taxation, at its "fair cash value." (Revenue act, secs. 3, 4.) This requirement, however, is nothing more than what the law would imply without it, for a simple, unqualified direction to value property, by its very terms imposes the duty of ascertaining and declaring its cash value. While the appellant, as a basis for taxation, scheduled the road at \$44,880, which was intended to represent half its value, only, yet it is admitted in the bill that the total value of the railway was \$100,000, being only \$5150 less than the valuation placed upon it by the board of equalization. When it is considered that values rest so largely in mere opinion, about which men of equal intelligence and honesty often materially differ, this small difference between the road's conceded value and its estimated value by the State board, is not at all surprising, and is clearly not of sufficient consequence to justify the present proceeding.

The taxes complained of were extended upon this valuation in strict conformity with the statute, and this is expressly so declared in the bill. It follows, therefore, that if any wrong has been done, it was by the town assessors, and not by the State board. The law required the State Board of Equalization to value the property at its fair cash value, and the taxes for that year to be extended against it upon that valuation. All this was done in substantial conformity with the requirements of the statute, yet the action of the board is assailed, and the tax is in part sought to be set aside, simply because the town assessors probably failed to perform their duty in respect to the assessment of other property in the townships.

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The appellant, in effect, says the board should have disregarded this law because the town assessors had done so in the assessment of the other property in the two townships. This view of the matter we do not regard as sound. Valuations for purposes of taxation had necessarily to be left to the judgment and determination of some human tribunal. The legislature in its wisdom has confided this duty and trust, in the case of railroad property like the present, to the State Board of Equalization, and that its action in the premises was intended to be final, except where fraud or corruption has intervened, is evidenced by the fact that no appeal from its determination is provided. As was said in the late case of *Connecting Railway Co. v. The People ex rel.* 119 Ill. 182: "Under the statute, the valuation for taxation of the property here affected is committed to the State Board of Equalization. No appeal lies from its decision to the county court, when acting on applications for judgment for delinquent taxes, or at any other time. Its decision is judicial in its nature, and it can therefore be assailed for fraud or want of jurisdiction only." To the same effect are the cases of *Spencer et al. v. The People*, 68 Ill. 513, and *Porter v. Rockford, Rock Island and St. Louis Railroad Co.* 76 id. 561.

The bill in this case does not disclose any facts whatever to sustain the charge of fraud found in it. That the board was not bound by the valuation fixed by the company is no longer an open question, and need not be discussed. *Spencer et al. v. The People, supra; Republic Life Ins. Co. v. Pollak et al.* 75 Ill. 292; *Humphreys et al. v. Nelson*, 115 id. 45.

In short, we do not think, under the facts disclosed by the bill, the court had any power or jurisdiction to review the action of the State Board of Equalization, or to grant the relief prayed.

The decree will be affirmed.

Decree affirmed.

Syllabus. Opinion of the Court.

THE PEOPLE OF THE STATE OF ILLINOIS

v.

JOHN H. NEDROW.

Filed at Springfield September 27, 1887.

1. FEES AND SALARIES—"fines or forfeitures" as including penalties—the statute construed. The words, "fines or forfeitures," in section 8, of chapter 53, relating to fees and salaries, as amended in 1883, are broad enough to include penalties for violation of law, the word "fine" and the word "penalty" being often used interchangeably, to designate the same thing.

2. SAME—*State's attorney's lien on penalty under the Pharmacy act.* State's attorneys have a lien for their fees upon judgments for the penalties named in the Pharmacy act, as well as upon judgments for other penalties, fines or forfeitures, and it is made their duty to prosecute suits for the collection of such penalties.

3. And as respects the question of the existence of the lien, it matters not that the State's attorney at whose instance the lien is declared was not the officer who did the most of the work in the case in which the penalty was recovered. As to whether that officer is entitled to the lien, or his predecessor is entitled to it, does not concern the board of pharmacy. The lien exists in favor of the officer.

APPEAL from the Appellate Court for the Third District;—heard in that court on an agreed case from the Circuit Court of Adams county; the Hon. WILLIAM MARSH, Judge, presiding.

Mr. E. S. SMITH, for the appellant.

Mr. OSCAR P. BONNEY, for the appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

The simple question in this case is whether district attorneys in this State have a lien for their fees upon the penalties mentioned in the 15th section of the Pharmacy act.

The 12th section of that act, entitled "An act to regulate the practice of pharmacy in the State of Illinois," (Hurd's

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Rev. Stat. chap. 91, p. 815,) provides, that "any person not being or having in his employ a registered pharmacist, within the meaning of this act, who shall * * * keep a pharmacy or store for retailing or compounding medicines * * * shall, for each and every such offence be liable, to a penalty of \$50." John H. Nedrow, the appellee herein, was prosecuted for a violation of the portion of said section so as above quoted before a justice of the peace of Adams county, and a judgment was recovered against him for \$50 on October 3, 1883. He appealed to the circuit court of that county and, after trial before a jury at the January term, 1884, a verdict of not guilty was returned and judgment entered in his favor. The People took an appeal to the Appellate Court, and, there, the judgment of the circuit court was reversed on January 16, 1885, and the cause remanded to the circuit court. After it had been placed upon the docket for trial at the October term, 1885, of said court, Nedrow dismissed his appeal from the justice of the peace to the circuit court, and paid into the hands of the clerk of the circuit court the \$50 so recovered by the People against him before the justice. The clerk now holds the money to be disposed of according to law.

On May 29, 1886, the People by the State's attorney, moved for a rule on the clerk to pay the money to the State's attorney. The board of pharmacy entered a cross-motion for a rule upon the clerk to pay the fine to the board of pharmacy. The circuit court overruled the cross-motion and sustained the motion of the People, entering an order that the clerk pay the \$50 to Oscar P. Bonney, State's attorney. At the request of said board, it was further ordered, that the questions involved should be certified to the Appellate Court for the Third District, in pursuance of the statute in such case made and provided and the stipulation as to facts therein filed, the People assenting thereto.

The board of pharmacy appealed from the judgment of the circuit court, and the questions involved were certified to the

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Appellate Court, which, after considering the cause upon the agreed case so certified, affirmed the judgment of the circuit court.

By the stipulation of the parties it was agreed that Mr. Bonney was not the State's attorney of the county when the case was tried before the justice, nor when it was tried on appeal before the circuit court, nor when it was heard before the Appellate Court, but was such State's attorney when the remanding order from the Appellate Court was filed in the circuit court and when Nedrow dismissed his appeal from the justice; that, when the \$50 was paid to the clerk, the unpaid fees due Bonney, as State's attorney, exceeded \$500, and that he does not claim the \$50 as payment of fees earned in said cause, but claims it should be applied in liquidation of said unpaid fees to the extent of the amount of said judgment; that, if the State's attorney should be entitled to the \$50 or any part of it, the clerk shall be ordered to pay it to him; that, if the board of pharmacy should be entitled to the money or any part of it, the clerk should be ordered to pay it to the board; that either party might appeal without bond or bill of exceptions.

An appeal is taken to this court by the board of pharmacy from the judgment of the Appellate Court, the latter court certifying that the cause involves questions of law of such importance on account of principal and collateral interests, that the case should be passed upon by the Supreme Court.

The Pharmacy act was approved May 30, 1881, and went into force July 1, 1881. Its 15th section is as follows: "All suits for the recovery of the several penalties prescribed in this act shall be prosecuted in the name of the 'People of the State of Illinois' in any court having jurisdiction; and it shall be the duty of the State's attorney of the county, where such offence is committed, to prosecute all persons violating the provisions of this act upon complaint being made. All penalties collected under the provisions of this act shall inure, one-

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half to the board of pharmacy, and the remainder to the school fund of the county in which the suit was prosecuted and judgment obtained."

The 82d section of the School law (Hurd's Rev. Stat. 1885, chap. 122, p. 1118,) which was in force at the time the Pharmacy act was passed and had been in force for many years prior thereto, provided, that all fines, penalties and forfeitures imposed or incurred in courts of record or before justices of the peace in this State, except those for trespasses on school lands and for violations of town and city ordinances, should be paid to the school superintendent of the county. The Pharmacy act so far changed the existing practice as to provide that the school fund should only receive the benefit of *one-half* of the penalties created by that act, while the other half should go to the board of pharmacy.

The 8th section of the act concerning "fees and salaries" (Hurd's Rev. Stat. 1885, chap. 53, p. 614,) was amended in 1883, two years after the passage of the Pharmacy act. The following words were added to that section by the amendment, which was approved June 15, 1883, and went into force July 1, 1883: "State's attorneys shall have a lien for their fees, on judgments for fines or forfeitures procured by them for their fees and earnings, until they are fully paid, and such payment shall operate as a release of the lien created by this act."

Although this amendment uses the words, "fines" and "forfeitures," and does not make use of the word, "penalties," yet there can be no doubt that the expression, "*fines or forfeitures*," is broad enough to cover and include the "penalties" referred to in the 15th section of the Pharmacy act. Bouvier, in his Law Dictionary, defines a "penalty" as "the punishment inflicted by a law for its violation;" he says: "The term is mostly applied to a *pecuniary punishment*." He thus defines a "fine:" "*Pecuniary punishment* imposed by a lawful tribunal upon a person convicted of crime or misdemeanor. It may include a *forfeiture or penalty* recoverable in a civil action."

Opinion of the Court.

From these definitions it would appear that the word, "fine," and the word, "penalty," are often used interchangeably to designate the same thing. They both mean "*pecuniary punishment*," and may, in many cases, be regarded as equivalents of each other. One of Webster's definitions of "forfeiture" is: "a fine or mulct;" and he refers to the words "fine, mulct, amercement, penalty" as being synonyms of the word "forfeiture."

It follows that State's attorneys have a lien for their fees upon judgments for the penalties named in the Pharmacy act, as well as upon judgments for other penalties, fines or forfeitures. It is made their duty by the 15th section of that act to prosecute all persons who violate its provisions. They are to conduct the suits for the recovery of the penalties, therein imposed, in the name of the People. By the 82d section of the School law they are to pay over the fines, penalties and forfeitures collected by them to the school superintendents after "retaining therefrom the fees and commissions allowed them by law." By the 8th section of the "Fees and Salaries" act, both before and after the amendment thereto of 1883, the fees and ten per cent on moneys collected, as therein provided for, are to be paid out of "any fines and forfeited recognizances collected by them." The School law and the Fees and Salaries act both recognize the policy of paying State's attorneys out of fines and penalties and their right to compensation obtained therefrom.

In line with this legislation the amendment of 1883 gives them a lien for their fees on judgments for fines and penalties, evidently referring to all such fines and penalties as it is made their duty under the law to sue for and collect. Two years before the passage of the amendment it became their duty to sue for and collect the penalties imposed by the Pharmacy act. There is no conflict between the 15th section of the Pharmacy act, passed in 1881, and the 8th section of the Fees and Salaries act, as amended in 1883. By the latter the legislature

Opinion of the Court.

necessarily referred to other and previous legislation in regard to fines and penalties, without specifying the particular acts, which provided for the fines and penalties intended to be designated. There is no reason for supposing that they did not have in mind as well the Pharmacy act as any other act of existing legislation, which imposed penalties and made it the duty of State's attorneys to institute prosecutions for their recovery.

There can be no good reason why the lien should not extend to the half of the penalty that is to go to the school fund. The school authorities are making no opposition to such a construction. The imposition of a lien for the fees of State's attorneys upon judgments for such penalties as are to be paid to the school fund is in harmony with the legislative policy of the State, as will appear by reference to the enactments upon this subject, which have had their place in the statute books for many years. If the half of the penalty, which belongs to the schools, is to be subjected to the lien, it will not be contended that the half, which goes to the board of pharmacy, should not also be so subjected.

It is true that, by the 11th section of the Pharmacy act, certain expenses of the board are to be paid from the fees and penalties received by it. But we can not see that there is anything in this provision which is opposed to the existence of the lien now under discussion. The reference is to the penalty received after the lien is discharged.

It appears from the stipulation that the present incumbent of the office of State's attorney did not become connected with the suit for the recovery of the penalty until it was remanded by the Appellate Court and re-docketed in the circuit court. It is therefore argued, that the recovery of the penalty was not due to his exertions and that on this account it should not be paid to him. It is not shown, however, that his predecessor in office did not do his duty in the prosecution of the case; on the contrary, it is claimed that he did appear as counsel therein.

Syllabus.

The lien exists in favor of the officer. As to whether the district attorney, who did the most of the work in the case, or his successor, who took it up at a late date, is entitled to the lien, is a matter to be settled between them and which does not concern the board of pharmacy.

We think that the \$50 should be paid to the State's attorney to be held by him subject to his lien, and, upon the discharge thereof, to be paid by him one-half to the board of pharmacy and the other half to the school fund.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

SHOPE, J., and SHELDON, Ch. J., dissenting.

THE CHICAGO AND ALTON RAILROAD COMPANY

v.

RALPH M. HOYT.

Filed at Springfield May 12, 1887.

122	369
159	467
155	684
45a	640
122	369
134	918
122	369
45a	245

122	369
50a	120
122	369
70a	334
122	369
70a	600

122	369
193	*177
122	369
e209	*180

1. *FELLOW-SERVANTS—who to be so regarded—as to locomotive engineer and car inspector.* The servants of the same master, to be co-employees, so as to exempt the master from liability on account of injuries to one resulting from the negligence of another, must be directly co-operating with each other in a particular business,—that is, in the same line of employment,—or their mutual duties must bring them into such habitual association that they may exercise a mutual influence on each other promotive of proper caution.

2. It was the duty of a car inspector to inspect freight cars on their arrival at the yards of the company. As soon as a train arrived the superintendent of that department directed the inspector to go upon the cars and begin the work of inspection, which he did on this occasion as soon as the train came to a full stop, and when about to step from one car to another, the engineer, without warning, suddenly started the engine with such unusual force that the train parted, and the inspector fell upon the track and was injured. The proof showed that when a freight train came to a certain place, as it did on the particular occasion, the engineer's duty

Brief for the Appellant.

in respect to the train ceased, and it was his duty to take his locomotive to the engine house, and after the inspection the train would be broken up by a switch-engine and set apart: *Held*, that the engineer and inspector were not fellow-servants engaged in the same employment, and that the railway company was liable for the injury to the inspector, he having been found to have exercised due care.

3. In such case, the duties of the engineer ceased at or before the inspector's began, so that it was impossible for the one to have exercised any influence whatever over the other, and therefore an instruction based upon the theory of their being fellow-servants was properly refused.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of McLean county; the Hon. O. T. REEVES, Judge, presiding.

Messrs. WILLIAMS & CAPEN, and Messrs. FIFER & PHILLIPS, for the appellant:

The common master is not liable to an employe for an injury received from the negligence of another employe in the same line of service, if the master has used reasonable care in the selection of his employes, and provided one servant does not represent the master as to the other servant. *Honner v. Railroad Co.* 15 Ill. 550; *Railroad Co. v. Cox*, 21 id. 20; *Railway Co. v. Troesch*, 68 id. 545; *Railway Co. v. Durkin*, 76 id. 395; *Railway Co. v. Swett*, 45 id. 197; *Railway Co. v. Taylor*, 69 id. 461; *Railway Co. v. Moranda*, 93 id. 302; *Railroad Co. v. Keefe*, 47 id. 108; *Railway Co. v. Britz*, 72 id. 256.

Every person who undertakes to work in a dangerous employment, undertakes to and does assume all the ordinary risks of such employment. *Railway Co. v. Donahue*, 75 Ill. 106; *Railroad Co. v. Welch*, 52 id. 183; *Railway Co. v. Flanagan*, 77 id. 365; *Railway Co. v. Durkin*, 76 id. 395; Cooley on Torts, 541, 551, 552, and cases cited.

Fellow-servants of a common master in the same line of employment, are employes whose ordinary occupations in such employment bear such relations to each other that the careless or negligent conduct of one endangers the safety of the other,

Brief for the Appellee.

where neither of them is the representative of the master as to the other. *Railroad Co. v. Murphy*, 53 Ill. 336; *Railroad Co. v. Hoyt*, 16 Bradw. 237; *Valtez v. Railway Co.* 85 Ill. 500; *Ryan v. Railway Co.* 60 id. 17; *Railroad Co. v. Keefe*, 47 id. 110; *Railroad Co. v. O'Bryan*, 15 Bradw. 134; *McAndrews v. Burns*, 39 N. H. 117; *Baird v. Pettit*, 70 Pa. St. 447; *Railway Co. v. Scheuring*, 4 Bradw. 533; *Railroad Co. v. Moranda*, 93 Ill. 302; *Coal Co. v. Jones*, 86 Pa. St. 432; *Randall v. Railroad Co.* 109 U. S. 478; *Wright v. Railroad Co.* 25 N. Y. 562.

Cases closely analogous to the one at bar, so far as the question of fellow-servants is concerned, are *McCosker v. Railroad Co.* 84 N. Y. 77; *Collins v. Railroad Co.* 30 Minn. 31; *Gormley v. Railroad Co.* 72 Ind. 31; *Coon v. Railroad Co.* 5 N. Y. 492; *Holden v. Railroad Co.* 129 Mass. 268; *Sammon v. Railroad Co.* 62 N. Y. 251; *Vick v. Railroad Co.* 95 id. 267; *Bull v. Railroad Co.* 67 Ala. 206; *Railroad Co. v. Doyle*, 60 Miss. 977; *Railroad Co. v. Wachter*, 60 Md. 395; *Hughes v. Railroad Co.* 27 Minn. 137; *Railroad Co. v. Hammersley*, 28 Ind. 371; *Morgan v. Railway Co.* (L. R.) 1 Q. B. 140.

Mr. M. W. PACKARD, and Messrs. STEVENSON & EWING, for the appellee:

Whether the appellee and the engineer were fellow-servants, is a question of fact, which is settled by the verdict. *Moranda case*, 108 Ill. 581.

The case of *Chicago and Western Indiana Railroad Co. v. Bingenheimer*, 116 Ill. 226, on the question of negligence, is exactly in point with the case at bar.

Cases similar to the one at bar, and illustrative of it, are *Railroad Co. v. Bingenheimer*, 116 Ill. 226; *Railway Co. v. Ross*, 112 U. S. 377; *Railway Co. v. Moranda*, 93 Ill. 302; *Railroad Co. v. Powers*, 74 id. 341; *Railroad Co. v. May*, 108 id. 288; *Railroad Co. v. Bliss*, 6 Bradw. 411; *Railroad Co. v. Hoffman*, 97 Ill. 287; *Rolling Mill Co. v. Johnson*, 114 id. 57.

Opinion of the Court.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This suit was brought by Ralph M. Hoyt, in the circuit court of McLean county, against the Chicago and Alton Railroad Company. It was brought to recover for personal injuries sustained by plaintiff, alleged to have been caused by the negligent conduct of defendant's servants in charge of a freight train. The judgment rendered in the circuit court, in favor of plaintiff, was affirmed in the Appellate Court, and as the case comes before this court, only questions of law can be considered.

It seems plaintiff was employed in the yards of the company, at the station where the accident occurred, and had been for many years prior to the time he was injured. His duty was to inspect freight cars on their arrival at the yards. The evidence tends to show, and that fact will be regarded as proved, the superintendent of that department directed him to go upon the cars immediately upon their arrival, and begin the work of inspection. That custom plaintiff had observed for many years. On the morning of the happening of the accident, a freight train came into the yards, and immediately upon its coming to a full stop, plaintiff went upon the car next the engine and commenced his usual work of inspecting the cars, and was about to step from the second car to the third car, when the engineer, without warning, suddenly started his engine with such unusual force that the train parted, and plaintiff, falling on the track, received severe and permanent injuries. Plaintiff testified the "jerk" "was so violent it almost raised the car from the track." On this branch of the case no question is made, nor can any be made in this court, against the finding of the jury that plaintiff was observing due care for his personal safety, and that it was the wrongful conduct of the engineer that caused the accident.

The defence insisted upon, both at the trial and in this court, is, that plaintiff, and the engine-driver, whose negligence is

Opinion of the Court.

alleged to have caused the injury, were fellow-servants of a common master, and engaged in the same line of employment, and therefore there could be, in law, no recovery, on the principle one servant of a common master engaged in the same service can not recover for the negligence of his fellow-servant. The point raised was most definitely made at the trial by an instruction stating the law applicable to fellow-servants, and which, it is insisted, had it been given, and had the jury been controlled by it, would have secured a verdict for defendant. That instruction the court modified, and, as modified, counsel for defendant refused to have it read to the jury. So the case may be considered as though the court refused to give the instruction. Assuming, then, that the instruction, as asked, states the law in relation to fellow-servants accurately, the question arises, was the defendant prejudiced by the refusal of the court to give it. That involves the inquiry whether it is applicable to the facts, or, what is the same thing, does the question whether plaintiff and the engine-driver were fellow-servants, fairly arise in the case. A brief reference to the evidence will be necessary to a solution of the question.

There is evidence tending to show, and the facts it tends to establish will be regarded as proved, that when a train got to a certain place, as this one did that morning, "it is the usual thing for the engine to go to the round-house—that is the usual practice." The switch-engine would then come and set the cars in the proper place. Of course, the engine-driver would be bound to obey the yard-master, and if he received a signal to move to another locality, no doubt he would be bound to observe it. But the evidence is full to the point, when the engine-driver came to a certain place and stopped the train, it "was his duty to go to the engine house." One reason that is stated why plaintiff was required to go upon trains so soon as they should be stopped, to do the work of inspecting them, was, that after the train should be broken up by the switch-engine and set apart, it would be difficult to find those that had not

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been inspected, or to ascertain when the work would be completed.

Regarding these facts, which the evidence tends to establish, as having been found in favor of plaintiff, it seems clear the duties of the engine-driver in connection with the train ceased at or before the time it was plaintiff's duty to go upon it to begin his work of inspection. On that hypothesis, how is it possible the engine-driver and plaintiff could be fellow-servants engaged in a common service? Inspecting cars after they are delivered in the yards can have no relation or connection with the running of trains to distant points. It is not the same service at all. A car inspector, under such circumstances, is no more a fellow-servant with an engine-driver than any workman in the shops who may have assisted, in the first instance, in making the car. It was said by this court, in *Rolling Mill Co. v. Johnson*, 114 Ill. 57, that the servants of the same master, to be co-employes so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business,—*i. e.*, the same line of employment,—or that their usual duties shall bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution. Adhering, as is done, to the correctness of the rule stated, it is clear the case in hand does not come within its operation. Plaintiff and the engine-driver were not engaged in the same business at all. It was distinct and wholly different, and had each continued in his particular business for any indefinite period, it is hardly probable they would have been brought into any relation where one might have exercised an influence over the other promotive of proper caution. In the very nature of the business each was engaged in, it was impracticable for one to have had any influence over the other promotive of proper caution, or otherwise. They were strangers to each other, and might have remained so for an indefinite time, so far as any-

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thing in their business relations would have brought them together. It is true they might have been fellow-servants in the strictest sense, and yet they might not have been associated an hour before the happening of the injury. What is meant is, if the parties continue to be engaged in a common service they will be habitually associated, so that they may exercise any influence over each other promotive of common safety. That never could have occurred in this case, for the obvious reason the duties of the engine-driver ceased at or before plaintiff's would begin, so that it would be impossible for one to exercise any influence whatever over the other. The doctrine of the refused instruction could have no application to the facts of the case, and had the court given it, the effect would have been to direct the attention of the jury to an issue not really involved. There was therefore no error in refusing to give the instruction, and whether the modification made by the court was correct or not need not now be considered. So far as the law applicable to fellow-servants had or could have any application to the facts of the case, it was stated with sufficient fullness by the court in the instructions given. In the view taken, defendant was not prejudiced by the refusal of the court to instruct as it was asked to do.

As respects the fourth instruction of the series given for plaintiff, it may be it contains one or more expressions not entirely accurate; but in view of the facts, it can hardly be said it worked any injury to defendant. There was but little, if any, contradictory evidence concerning the material facts upon which plaintiff's right to recover rests. It is seen, plaintiff has a clear right of action, and the judgment in his favor ought not to be reversed for a mere inaccurate expression in an instruction given by the trial court, when it can be seen it did no harm.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Syllabus.

122 376
30a 488
30a 494
30a 496
122 376
122 376
95a 1225

THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY

v.

THE CITY OF BELLEVILLE.

Filed at Mt. Vernon June 20, 1887.

1. **STREETS**—vacating streets—by what authority—and of the mode. A public street or alley in a city can be vacated or closed only by the city council, and by it only upon a three-fourths majority vote of all the aldermen authorized by law to be elected, to be taken by ayes and noes, and entered upon the record of the proceedings of the council or board.

2. So a railway company, relying upon a resolution of the common council of a city vacating or allowing the closing of a portion of a public street, must see that such resolution or order has been adopted by the required vote, and entered upon the record of the proceedings of such common council. If such company closes up or obstructs a street not legally vacated, it may be held liable for the obstruction.

3. **SAME**—use of street by railway company—whether right exclusive, or jointly with the public. Where the joint use of a public street is granted to a railway company with the public, and its right is not exclusive in any portion thereof, the company may be properly convicted of a breach of an ordinance against obstructing streets and their crossings by locomotives and cars.

4. An ordinance or resolution of a city appropriated certain streets to a railway company, "so far as the said company may require to appropriate the same in crossing them, in the construction of their railroad track, switches, turn-tables, etc., and other machinery and fixtures to be used or employed by them in operating their said road, subject, however, to this proviso: that the same shall be occupied with as little detriment and inconvenience to the public as possible," and requiring the crossings to be so graded as to make any embankments that should be made, no obstruction: *Held*, that this was but a provision for a joint use with the public having occasion to use the streets by other modes of travel.

5. **ESTOPPEL**—how it may arise. It is of the essence of an estoppel *in pais*, that the party having authority to act in the matter shall have knowingly done an act to influence the conduct of the other, and that the other must have acted on the faith of that act. A person having no authority to act, can not, by his conduct, estop others not responsible for his conduct.

6. A city will not be estopped by the acts or promises of a committee of the city council or the acts of the city attorney, such committee being known to have no power to do the act which is sought to be affected by estoppel.

Statement of the case.

7. SAME—*municipal corporation—estoppel by deed not accepted.* If a municipal corporation may be subject to the doctrine of equitable estoppel, it can not be estopped by a deed to it of land for a roadway or street which it has never accepted or authorized to be accepted.

8. So a deed of land to a municipal corporation, for public use as a street, without acceptance, confers no rights on the grantor and imposes no obligations or duties upon the grantee. Leaving such deed with a city attorney for the city does not give effect to the same, and he can not accept the same, on behalf of the city, by any act of his without the authority of the city council.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. AMOS WATTS, Judge, presiding.

This is an appeal from the judgment of the Appellate Court for the Fourth District, affirming a judgment of the circuit court of St. Clair county, convicting appellant of violating an ordinance of appellee, prohibiting owners of locomotives, cars, etc., to obstruct crossings, etc., of streets thereby. So much of the facts as is essential to an understanding of the case may be briefly stated, as follows:

The road of appellant runs in a direction north-west and south-east, across Abend's addition, crossing Richland, Spring and Illinois streets, which run north and south, and Sixth and Seventh streets, which run east and west. The railroad depot is located on Seventh South street, to the east of its junction with Spring street, and the appellant claims the right to the exclusive use of Spring street for its yards and necessary use. The appellant is successor of the Belleville and Illinoistown Railroad Company, and entitled to all its property, franchises, grants and privileges. The record shows that Spring street, and the next street west of the appellant upon Seventh street, was dedicated to the city of Belleville in 1849. In 1853, a resolution permitting the Belleville and Illinoistown Railroad Company to use certain streets of the city, was adopted by the city council, which reads as follows:

Statement of the case.

"Resolved by the city council of the city of Belleville, That the use of the following named streets in the city of Belleville, in Chandler and Abend's addition thereto, be and the same are hereby appropriated to the Belleville and Illinoistown Railroad Company, so far as the said company may require to appropriate the same in crossing them, in the construction of their railroad track, switches, turn-tables, and other machinery and fixtures necessary to be used or employed by them in operating said road,—namely, High, Illinois, Spring, Richland, Race, South, Fifth, Sixth and Seventh South streets, and such alleys in said Chandler and Abend's addition as are crossed by said railroad track: Provided, that the same shall be occupied with as little detriment and inconvenience to the public as possible; and if said railroad shall find it necessary in crossing any of said streets, to raise embankments across the same, the streets crossing said embanked streets shall be so graded as not to make their said embankments an obstruction to crossing the same."

Appellee introduced in evidence an ordinance prohibiting the obstruction of street crossings, etc., and appellant admitted on the trial, that it had obstructed Spring street before the commencement of the suit. Appellant claimed that that portion of Spring street within its yards had been vacated in 1852, and until that part of the addition to the city south of appellant's road had been considerably built upon, no controversy had arisen between it and the public concerning the use of Spring street. No action of the city council, entered of record, was introduced showing such vacation. It was also claimed by appellant, that several years before the commencement of the suit, the grounds south of the railroad having been fenced in, admitting of no passage from Spring street to Illinois street, complaints were made by persons who had acquired property and built houses south of the railroad, of the blocking of Spring street crossing by the railroad company, and the city council appointed a committee to confer with the railroad

Statement of the case.

company and adjust the matter; that this committee met the officers of the company, and it was agreed that the railroad company should construct a roadway on its right of way for public use, from Spring street to Richland street, and should acquire property and open up a roadway from Spring to Illinois street, and build a sidewalk, so as to afford convenient access from both streets to Spring street, and that the railroad company should continue in the use of Spring street; that this was reported to the city council; that the railroad company made the roadway on its right of way, to Richland street, and purchased property and opened up a way to Illinois street, constructed the sidewalk, and the city took possession of the strip of land purchased by the railroad company, and improved and worked it as a street of the city; that the city afterward attempted to vacate so much of Spring street as was within the yards of the company, and published the ordinance as having been passed, sent a copy thereof to the railroad company, and the company executed a deed for the strip of land south of the railroad to the city, and delivered the same to James M. Hay, the then city attorney; that this deed the city attorney did not present to the city council, and it was subsequently lost; that the city having been sued for damages in regard to this crossing, the city attorney, Martin Schaefer, requested the company to execute another deed for this strip, which was done, and this deed, and the fact that the city had procured thereby other convenient access to this property to lot owners, was used by the city attorney as evidence in that suit. But the deed, when laid before the city council, was not accepted by it, and a resolution was adopted by the city reciting that the ordinance vacating the street was not passed legally by the council, and that the present council refused to pass that or any similar ordinance, and the clerk was therefore ordered to return the deed to the railroad company. The deed was returned to the railroad company.

Brief for the Appellant.

By agreement of parties, the cause was tried by the court without the intervention of a jury. Appellant asked the court to hold the following propositions of law, but the court refused, and appellant excepted:

"First—If the city, by its officers or agents, induced the defendant to expend money in making a roadway from Spring to Richland street on its right of way, for the use of the public, and to purchase land and open a way from Spring to Illinois street, upon the understanding and promise, expressed or implied, that the defendant, in consideration thereof, should have the right to use that portion of Spring street within its yards, for yard purposes, and said city took possession of the lands so purchased, and other lands of the company, in pursuance to said understanding, and worked and used the same as a street, then said city is estopped from recovering a penalty from defendant for using such portion of Spring street for yard purposes, and the court ought to find the defendant not guilty.

"Second—That the resolution or ordinance of the city council, of A. D. 1853, is a license to the defendant, if it is the successor of the railroad company therein named, to use that portion of Spring street within its yards, for yard purposes, and the city can not recover a penalty for using said street for such purposes, even if it obstructs the street thereby such use, without first revoking said license, or giving the defendant notice that such use must be discontinued.

"Third—If the city accepted a deed from defendant for the strip of land mentioned in ordinance of city, of July 5, 1883, and used the same in defence of a suit brought against the city, and took possession of said strip of land, and worked the same as a street of the city, it is estopped from prosecuting defendant for a penalty."

Mr. R. A. HALBERT, for the appellant:

The question here presented is not whether the railroad company can take possession of a portion of a street for a pri-

Brief for the Appellee.

vate use, to the exclusion of the public, but whether it may use a portion of a street for a public use, and after it has laid out money at the instance of the city and its officers for such use, and the city has taken possession of and used, and still uses, property purchased for the use of the city, in order that it might so use the street, it can be prosecuted by the city for a penalty, under an ordinance which forbids the standing of cars upon the street, for any purpose, at any time.

In a proceeding to oust the company of its depot, the question would not so much be as to whether the city had the power to grant a street for depot grounds, but whether, after having induced the company to build its depot in the street, the city would not be estopped from asserting it had no power to do so.

The cases cited by the Appellate Court have no application to the real question. *Stack v. East St. Louis*, 85 Ill. 377, was a suit by an abutting owner to recover damages of the city, and not a suit by the city to recover a penalty. *Quincy v. Jones*, 76 Ill. 231, simply holds that the right to lateral support of adjacent soil is limited to the soil in its natural state. *Jacksonville v. Railway Co.* 67 Ill. 540, holds that the legislature can not grant the right to railroads to use property dedicated to the city for a public square. *Railroad Co. v. Reich*, 101 Ill. 158, was to test the right of a lot owner to recover damages for cutting access to his lot. In *Chicago Dock and Canal Co. v. Chicago*, 115 Ill. 115, it was held that the right to lay tracks in the street could be granted to the dock company, and that when laid and connected with railroads its use became public. The question of estoppel did not arise in either of those cases.

Mr. M. W. SCHAEFER, City Attorney, for the appellee:

The settled doctrine of our Supreme Court, according to all the late cases, is, that a city holds its streets, alleys and squares in trust for the public, and has no authority to convert or divert them for other uses, or grant to any one an exclusive right to

Opinion of the Court.

their use. *City of Jacksonville v. Railway Co.* 67 Ill. 540; *City of Quincy v. Jones*, 76 id. 231; *Village of Princeville v. Auten*, 77 id. 325; *Stack v. City of East St. Louis*, 85 id. 379; *City of Morrison v. Hinkson*, 87 id. 587; *Railroad Co. v. Reich*, 101 id. 157; *City of Quincy v. Bull*, 106 id. 337; *Canal Co. v. Garrity*, 115 id. 155; *Parlin v. Mills*, 11 Bradw. 402; *Lee v. Town of Mound Station*, 118 Ill. 304; Dillon on Mun. Corp. (2d ed.) sec. 581.

In permitting streets to be used for railroad purposes, the city has no right to obstruct the streets and deprive the public and adjacent owners of their use. *Morrison v. Hinkson*, 87 Ill. 587; *Railroad Co. v. Reich*, 101 id. 157; *Canal Trustees v. Havens*, 11 id. 554; *Quincy v. Bull*, 106 id. 349.

This is an action at law, and estoppels *in pais* are available only in a court of equity. *Stock Yards v. Ferry Co.* 102 Ill. 514; *Winslow v. Cooper*, 104 id. 235.

The cases cited by appellant sustain this principle. *Logan County v. City of Lincoln*, 81 Ill. 156; *Martel v. East St. Louis*, 94 id. 67; *People v. Brown*, 67 id. 467.

The authorities cited by appellant all bear on the assumption that the city is seeking to entirely oust the company from any use of Spring street whatever, which is not the case.

The ordinance was not passed by the requisite vote. The deed relied on as an estoppel was never delivered and accepted. The city attorney was not authorized to accept it.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The only questions that we are at liberty to consider, are expressed in the three propositions in writing, presented by counsel for appellant to the circuit court, and asked to be held to be the law, for no question of law arose upon the trial in any other manner.

First—It is provided by section 1, chapter 145, of the Revised Statutes of 1874, that it shall require a three-fourths majority of all the aldermen of the city authorized by law to

Opinion of the Court.

be elected by such city, to vacate or close any street or alley, such vote to be taken by ayes and noes, and entered upon the record of the council or board. No other body or officers or persons have authority in the matter. The records are open to the inspection of the public, and it is incumbent on any one acting on the faith that a street or alley is closed, to know what is the fact, unless he shall be prevented by those having authority to act for the city, from obtaining such knowledge. There is no evidence in this record tending to show that the railroad company was prevented by those having authority to act for the city, from learning whether this vacating ordinance was adopted by the requisite vote of aldermen. The railroad company is therefore presumed to have known that it was not so adopted, and hence that it was invalid and ineffective for any purpose.

The deed first made to the city was never accepted by the city council. Indeed, it was never presented to it, having been lost by the city attorney, in whose custody it was placed, and the second deed was expressly rejected by the city council. The city attorney had no authority to accept the deed, and any use he made of it, not having been by the authority of the city council, is immaterial. It is of the essence of an estoppel *in pais* that the party having authority to act in the matter, shall have knowingly done an act to influence the conduct of the other, and that the other must have acted on the faith of that act. *Davidson v. Young*, 38 Ill. 145; *Schnell v. City of Chicago*, id. 382; Bigelow on Estoppel, 480.

No one pretends that a person having no authority to do an act can, by his conduct, estop others not responsible for his acts; and so here, no reason is shown why any reliance should have been placed by the railroad company upon the acts or promises of a committee of the council, which was known to have no power itself to vacate streets, or upon the conduct of the city attorney, who was known to be equally destitute of such authority. Even then, if the case is one wherein the

Opinion of the Court.

doctrine of equitable estoppel might be applied, which is not conceded, the first proposition asked is clearly erroneous as applied to the facts, and the court properly refused to hold it.

Second—The ordinance of 1853 does not assume to license an exclusive occupancy of the street. It only assumes to authorize the railroad company to use the streets named, “so far as the said company may require to appropriate the same in crossing them, in the construction of their railroad track, switches, turn-tables, etc., and other machinery and fixtures, to be used or employed by them in operating their said road, subject, however, to this *proviso*: ‘That the same shall be occupied with as little detriment and inconvenience to the public as possible, and if said railroad company shall find it necessary, in crossing any of said streets, to raise embankments across the same, the streets crossing said embankments shall be so graded as not to make their said embankments an obstruction to crossing the same.’” This is but a provision for a joint use with that portion of the public having occasion to use the streets, adopting other modes of travel. (*Pittsburg, Fort Wayne and Chicago Railroad Co. v. Reich*, 101 Ill. 157.) And the streets being open still for general public use, the ordinance prohibiting their obstruction is within the municipal power. *Illinois Central Railroad Co. v. Galena*, 40 Ill. 344; *Toledo, Peoria and Warsaw Railway Co. v. Town of Chenoa*, 43 id. 209.

Third—The facts clearly show, and there is no evidence tending to show otherwise, that the city did not accept the deed of appellant, as assumed in this proposition. The first proposition not being maintainable, there is no ground whatever upon which this can rest.

The legal principles enunciated in the opinion of the Appellate Court, (*St. Louis, Alton and Terre Haute Railroad Co. v. City of Belleville*, 20 Bradw. 580,) as well as the judgment rendered by that court, have our concurrence.

The judgment is affirmed.

Judgment affirmed.

Syllabus. Brief for the Plaintiff in Error.

MICHAEL SULLIVAN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Springfield September 27, 1887.

1. CRIMINAL LAW—*proof of the venue of the crime.* It is not essential that the evidence shall directly and positively show that the offence of which one is charged was committed in the county. It will be sufficient if that fact is shown from the entire evidence. Proof that a crime was committed in Chicago, is proof that it was committed in Cook county, as the court will take judicial notice that Chicago is in Cook county.

122	385
41a	275
122	385
153	817
122	385
53a	502
56a	472
56a	665
122	385
206	533

2. PRACTICE—*when specific objection should be made—as to admissibility of evidence.* The objection to the admission of a record of a former conviction of one charged with crime, that the defendant is not identified as the person formerly convicted, should be specifically made on the trial, so that it might be obviated by other proof. A general objection will not save the point in this court.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Mr. GEORGE H. KETTELLE, for the plaintiff in error:

The record purports to contain all the evidence given on the trial below, and it does not appear affirmatively that the offence charged was committed in the county alleged in the indictment. *Rice v. People*, 38 Ill. 435; *Jackson v. People*, 40 id. 405.

It does not appear affirmatively, from the evidence in this case, that the Michael Sullivan convicted of larceny on the 5th day of May, 1880, was the plaintiff in error. Without this evidence, the introduction of the record of the conviction of one Michael Sullivan on that day was an error. Something more is needed than the mere record evidence of the conviction of one Michael Sullivan, as the question of previous conviction involves that of identity, and this is an important question to be passed upon by the jury. 1 Bishop on Crim.

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Law, sec. 963; *Hines v. State*, 26 Ga. 614; *Brooks v. Commonwealth*, 2 Rob. (Va.) 845.

The mere fact of the same name won't do, because there were many Michael Sullivans in Cook county, in May, 1880, the directory of the city of Chicago, alone, giving over twenty of that exact name. Of the many Michael Sullivans living in Cook county in 1880, which was the one convicted of larceny on the 5th day of May, 1880, by the Criminal Court of Cook county, as alleged in the indictment? The record in this case is silent upon this question, as well as the fact that the plaintiff in error was the Michael Sullivan convicted of larceny in the Criminal Court of Cook county, on the 5th day of May, 1880. Identity of name is not, by itself, when the name is common, and when it is borne by several persons in the same circles of society, sufficient to sustain a conclusion of identity of person. 1 Wharton on Crim. Ev. sec. 802.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

At a term of the Criminal Court of Cook county, Michael Sullivan was tried and found guilty of the crime of burglary, and his punishment fixed at twenty years in the penitentiary. Two grounds of error are relied upon for the reversal of the judgment.

First—It is said, although the record purports to contain all the evidence given upon the trial, it does not affirmatively appear the offence charged was committed in the county alleged in the indictment. This, it is thought, is a misapprehension of the evidence. It is charged in the indictment, the offence of which defendant was convicted was committed in Cook county, and when all the evidence in the case is considered, that fact sufficiently appears. The prosecuting witness testified she lived on "Emerson avenue, formerly called Ashley street," and that the offence was committed in her house. One of the witnesses for the defence testified that she

Opinion of the Court.

lived near the prosecuting witness, at whose house the trouble occurred, and that she had lived on Emerson avenue twenty years and in Chicago twenty-seven years. This evidence, considered in connection with the affirmative fact that appears from the record the trial was had in Cook county, where it is alleged the offence was perpetrated, is sufficient to support the finding of the jury the offence was committed in the county of Cook, as alleged in the indictment. It is proved the offence was committed on "Emerson avenue," and that it is a street in Chicago. Of course this court will take judicial notice that Chicago is in Cook county. Proof that a crime is committed in Chicago, is proof that it was committed in Cook county. On the whole record considered, not the slightest doubt remains the offence of which defendant was convicted was "committed in the county alleged in the indictment."

Second—The prosecution gave in evidence the record of a former conviction of Michael Sullivan, and that, it is said, was error, for the reason it does not affirmatively appear, from the evidence in the case, the Michael Sullivan formerly convicted was the present defendant. The objection taken to the admission of the record of the prior conviction was general. No particular objection was pointed out. The point now insisted upon should have been made at the trial. Had it been made, then the objection to the admission of the evidence might have been obviated by proof at once,—otherwise defendant would have had the benefit of his objection. Defendant ought not to be allowed the benefit of an objection to the mere admission of evidence that he did not make or insist upon in the trial court.

Whether defendant is guilty of the crime as alleged against him, of course is a question of fact; and as the evidence touching that fact is conflicting, this court would not feel warranted in reversing the finding of the jury except for the strongest reasons. There is evidence, if the jury believed it, that would warrant the verdict. On a full consideration of the evidence it can not be fairly said the verdict is so much against the

Syllabus.

weight of the evidence it ought to be set aside. It was the province of the jury to find whether defendant was guilty or not, and the court before whom the cause was tried having approved the finding by rendering judgment on the verdict, that judgment should not now be reversed unless it plainly appeared the finding of the jury was so much against the weight of the evidence as to do injustice.

The judgment will be affirmed.

Judgment affirmed.

Mr. JUSTICE SHOPE, dissenting.

122	388
130	456
122	388
132	320
122	388
137	502
122	388
140	583
144	638
122	388
59a	314
122	388
174	523
122	388
181	474

MARY CLARK *et al.*

v.

JACOB P. CLARK.

Filed at Springfield September 27, 1887.

122	388
198	491

1. **SPECIFIC PERFORMANCE—parol agreement to convey land—whether established.** The specific performance of a parol contract for the sale of land will not be enforced by a court of equity, unless, in addition to other requirements, such contract is established, by competent proof, to be clear, definite and unequivocal in its terms.

2. Testimony given years after alleged conversations as to what a father said about his intention to give or deed his son a farm, or as to his statements of what he told his son upon that subject, does not establish a clear, definite and unequivocal contract between the father and the son. A court of equity will not execute the expressed intention and expectation of a father to give his son a farm, unless such intention and expectation have ripened into and become embodied in a definite agreement.

3. A father rented a farm to his son in 1878 at a low rent, and the son being dissatisfied, in 1880 threatened to leave the place and go elsewhere, but afterward gave up that intention and continued to occupy the same, making some very trifling improvements for his own benefit, still paying the same rent, until his father's death, after which he rented the place of the devisee of his father. The proof showed that the father had several times stated that he had given, or intended to give, the farm to him, the son not being

Brief for the Appellants.

present, except on one occasion, and it did not appear that the son ever held possession other than as a tenant. After his father's death and his renting from the devisee, he filed his bill for specific performance of an alleged parol contract of his father to convey him the land, to which the Statute of Frauds was pleaded by answer, which also denied the contract: *Held*, that the bill could not be maintained.

4. **STATUTE OF FRAUDS—part performance.** Acts relied on to show part performance will not operate to defeat the operation of the Statute of Frauds, unless they are done under the contract itself. If they might have been done with other views, they will not take the case out of the statute. It must appear that the party entered into possession of the land under the contract, and in performance of it, and that he was allowed to make valuable and permanent improvements under his contract of purchase, and not otherwise. If the acts are referable to a tenancy, they will not do.

Appeal from the Circuit Court of McDonough county; the Hon. CHARLES J. SCOFIELD, Judge, presiding.

Messrs. PRENTISS & BAILEY, for the appellants:

Before the complainant can recover, he must prove, by competent evidence, a specific and well defined contract between himself and father, based on a valuable consideration, and that he has complied with the terms of the contract. *Insurance Co. v. Rink*, 110 Ill. 538; 1 Story's Eq. Jur. sec. 769.

Before he can recover he must show a legal and binding contract between him and his father,—not a mere promise that his father would give him the farm.

An oral promise to give or devise to a son of promiser a farm then in possession of the former as tenant of the latter, is within the Statute of Frauds, and void, although the son, with the assent of the father, erected buildings on the premises, relying upon such promise. *Smith v. Smith*, 78 Am. Dec. 49; *Cassel v. Cassel*, 104 Ill. 361; *Forward v. Armstead*, 12 Ala. 124; 46 Am. Dec. 246.

No parol contract for the sale of real estate will be enforced unless the vendee goes into possession under the contract; and if his possession is the continuation of a former tenancy, or can be construed as such, the court will hold that he is in

Brief for the Appellee.

possession under the contract of tenancy, and not under the contract to purchase. *Seymour v. Delancy*, 3 Cow. 445; 15 Am. Dec. 270.

The mere possession of the land contracted for will not be deemed a part performance if the vendee be a tenant in possession under the vendor, for his possession is properly referable to his tenancy, and not to his contract. *McCormack v. Sage*, 87 Ill. 485; *Johnston v. Glaney*, 4 Blackf. 94; 28 Am. Dec. 45; *Wood v. Thornly*, 58 Ill. 464.

To take the case out of the operation of the Statute of Frauds, on the ground of part performance, it is indispensable that the acts done relate solely and exclusively to the contract. *Wallace v. Rappleye*, 103 Ill. 231.

There is no evidence in the case that Jacob stayed on the farm in pursuance of the alleged contract, except the evidence of Jacob himself, and that is incompetent. *Cassel v. Cassel*, 104 Ill. 361.

Mr. C. F. WHEAT, and Mr. D. G. TUNNICLIFF, for the appellee:

That this kind of a contract is one based upon a valuable consideration, is not debatable. It has been so held by every court where the question has arisen.

The question as to the adequacy of the consideration can hardly be said to arise. There is no ambiguity about the contract. Nothing is left to conjecture. Nothing impossible is to be performed, and the evidence is clear, definite and unequivocal.

Payment of the purchase money and taking possession are sufficient to take the case out of the Statute of Frauds. *Ramsey v. Liston*, 25 Ill. 114; *Bright v. Bright*, 41 id. 97; *Kurtz v. Hibner*, 55 id. 514; *Langston v. Bates*, 84 id. 524; *Bohanan v. Bohanan*, 96 id. 591; *McDowell v. Lucas*, 97 id. 489.

Opinion of the Court.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

This is a bill filed by appellee in the circuit court of McDonough county for the specific performance of an alleged parol contract for the sale of land. The circuit court decreed the relief asked for, and the case is brought before us by appeal from that decree.

John P. Clark, the father of appellee and eleven other children, owned in his lifetime four hundred acres of land, including eighty acres bought by him in 1878. The eighty acres were situated in Bethel township in said county and known as the Bethel farm. John P. Clark died testate on October 18, 1883. He made a will, dated August 17, 1883, and probated in the county court of McDonough county on October 22, 1883. By his will he gave and devised all his real and personal estate to his widow, Mary Clark, one of the appellants herein and mother of appellee, during her natural life.

Appellee moved upon the Bethel farm with his wife and children on or about April 8, 1878, and lived there from that time until the filing of this bill on December 22, 1884.

The bill alleges, that, in the fall of 1880, John P. Clark agreed with his son Jacob, the appellee herein, that, if the latter would not move to Iowa but would remain on the Bethel farm and give his father one-third of the crop raised thereon so long as his father should live, he, Jacob, should have the farm. This is the contract, which is sought to be enforced.

The contract is, of course, void under the Statute of Frauds because it is not in writing, unless there has been such a part performance as to take it out of the statute. The bill was answered by the widow and five of the sons and one of the daughters of the testator, all devisees under the will, and, in their answers, they deny the making of the contract and plead the Statute of Frauds.

The specific performance of a parol contract for the sale of land will not be enforced by a court of equity unless in addi-

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tion to the other requisites hereinafter named such contract is established, by competent proofs, to be clear, definite and unequivocal in its terms.

The evidence in this case shows that in the fall of 1880 some difficulty or misunderstanding occurred between the appellee and his father, as a result of which appellee announced his intention of leaving the Bethel farm and going to Iowa. He changed his mind, however, and remained. A number of witnesses swear, that after this time they heard John P. Clark say that he told his son Jacob that he would "give" him the Bethel farm if he would not go to Iowa. None of them testify that what they thus heard was said in the presence of appellee. A number of other witnesses swear that, after appellee concluded not to go to Iowa, they heard his father say that he was going to "deed" or "convey" the farm to Jacob, or that he told Jacob he was going to deed or convey it to him. Only one of these testifies to hearing anything said upon the subject when appellee and his father were both present; Rebecca Mathena says, that once, in Jacob's yard, Jacob said to her that his father would deed the place to him, and that his father at the time was standing about fifteen or twenty feet away yet made no response and did not confirm the statement of the son.

Testimony, given years after the conversations testified to took place, as to what John P. Clark said about his intention to give or deed his son a farm, or as to his statements of what he told his son upon that subject, does not establish a "clear, definite and unequivocal" contract between him and his son. A court of equity will not execute the expressed "intention and expectation" of a father to give his son a farm, unless such "intention and expectation" have ripened into and become embodied in a definite agreement. (*Cassel v. Cassel et al.* 104 Ill. 361.) In *Bailey et al. v. Edmunds*, 64 Ill. 125, where this court affirmed a decree of the circuit court of Bond county dismissing a bill for the specific performance of an alleged

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verbal agreement by a father, the defendant, to convey one hundred and ninety acres to his daughter, one of the complainants, testimony was introduced of a similar character to that which appears in this record. In the opinion in that case the following language is used: "Aside from the testimony of the complainants, there is no evidence of the alleged contract save statements of the defendant, testified to by quite a large number of witnesses in different casual conversations had with him, to the effect that he had given, or intended to give, or that he had conveyed, or would convey, to his daughter the land on which she lived."

It is not claimed or pretended that appellee ever paid his father a dollar of money, or performed for him the labor of a single day, towards the purchase of the farm. He was not to pay any taxes nor did he pay any either before or after his father's death. He was to give his father one-third of the crops raised upon the land during the old man's life. But by doing so he merely paid what was less than a fair rent for the farm. The testimony is uncontradicted, that the eighty acres could easily have been rented for two-fifths of the crop. When appellee was making his arrangements to go to Iowa, John P. Clark actually rented the place to one William Miller upon an agreement that the latter should give two-fifths of the grain raised.

Appellee was not materially injured by a failure to perform the alleged contract. Nor does the testimony show any such acts of performance on his part as would compel him to suffer an injury amounting to a fraud, in case the supposed contract should not be executed. (*Wallace v. Rappleye*, 103 Ill. 229; *Wood v. Thornly*, 58 id. 464.) It does appear, that, when he was preparing to go to Iowa in September, 1880, he sold some of his property. He sold his crop and his wagon to his brother, Silas. The crop, however, he did not deliver, and, when he concluded to give up going to Iowa, his brother returned the wagon to him. He sold a span of colts, but he received for

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them all they were worth. He also sold some hogs, but it does not appear that he sold them at a sacrifice. Whether he made these sales of property by reason of his father's refusal to perform the contract, or whether he abandoned his intention of seeking a home in Iowa by reason of his father's promise to execute the contract, we can not see that, in either case, he lost anything. He had the farm from April, 1878, to September, 1880, for one-third of the crops, and he continued to have the farm for one-third of the crops from September, 1880, to his father's death.

It is said, that the contract is taken out of the Statute of Frauds, because appellee went into possession of the land and made valuable improvements thereon. Acts relied on to show part performance will not operate to defeat the Statute of Frauds, unless they are done under the contract itself and for the purpose of performing it. If they might have been done with other views, they will not take the case out of the statute, since they can not properly be said to be done by way of part performance of the agreement. It must appear that the party entered into possession of the land under the contract itself and in performance of it, and that he was allowed to make valuable and permanent improvements under his contract of purchase and not otherwise. *Wood et al. v. Thornly*, 58 Ill. 464.

We think the evidence in this case shows that appellee went upon the land in 1878 as a tenant of his father under an agreement to pay one-third of the crops as rent. His possession was originally taken under this tenancy and not under any contract of sale. His possession after 1880 will be presumed to have been a mere continuation of his former occupation as lessee. It is "properly referable to his tenancy and not to the contract." 1 Story's Eq. Jur. (12th ed.) sec. 763. The proof of a contract is not so clear as to establish a change in the character of the occupancy after 1880. The evidence

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is not conclusive that what was the possession of a tenant before that date became the possession of a vendee thereafter.

As to the improvements they were not lasting or valuable. When appellee went upon the land in 1878, there were upon it a house, a stable and fencing. He built what is called a porch on one side of the house; its columns were mere poles; its floor consisted of oaken boards laid upon the ground; its roof was shingled with shingles belonging to his father. He built an addition to a granary to be used for a milk house; in size it was eight by ten feet, and it had a shed roof made of boards sawed from logs out of his father's timber. The porch and milk house together were not worth over \$15. He also dug a well in a slough for the purpose of getting water for his cattle and walled it with rock taken from his father's land. The improvements were such as any tenant, expecting to occupy a farm for a number of years, would make for his own convenience.

The conduct of appellee himself is opposed to the idea that he was occupying the land under an agreement that it was to be deeded to him. He says he became angry with his father in the fall of 1880 and threatened to leave and go to Iowa, because his father had often before that time promised to deed the farm to him and had not fulfilled his promise. Yet, according to his own admission, he gave up the trip to Iowa, and received nothing for remaining except the same promises that he had already become dissatisfied with. Several witnesses testify that the real cause of the trouble between him and his father was his refusal to give the old man the full share of one-third of the crop to which the latter was entitled as rent for the farm, and that his father did nothing more to induce him to stay than to agree to let him have the farm on the same terms as before.

John P. Clark seems to have been confined to his house by sickness for about two months before he died, and yet appellee

Syllabus.

does not appear to have said one word to him during that time about the execution of a deed of the farm.

Mrs. Clark, appellee's mother, swears, that in the fall of 1884 about a year after her husband's death, appellee came to her and wanted to rent the farm of her upon the same terms, upon which he had rented it of his father, and she told him he could have the place as long as he gave her one-third of the crop. She is confirmed by the testimony of several witnesses, who swear that, when appellee was threshing grain in the fall of 1884, he divided it so that one-third thereof should be separated from the other two-thirds, and stated, when he did so, that his mother was to get the one-third as rent, and he was himself to keep the rest. Why recognize his mother as landlord, if the land was his own? He did not file this bill, until his mother attempted by a distress warrant to collect the rent, which he failed to pay according to his agreement with her.

The decree of the circuit court is reversed with directions to dismiss the bill.

Decree reversed.

Mr. JUSTICE CRAIG, dissenting.

122	396
88a	238
122	396
d187	495
122	396
104a	230
e104a	231

RICHARD DUNNIGAN

v.

ELI F. STEVENS, Admr.

Filed at Springfield September 27, 1887.

1. NEGOTIABLE INSTRUMENTS—*liability of indorser—by what law governed.* Where promissory notes are made and indorsed in another State, the law of that State will govern as to the indorser's liability.

2. SAME—*character of liability under the law merchant.* Under the law merchant, the indorsement of a note amounts to a contract on the part of the indorser, that if, when duly presented, the note is not paid by the

Syllabus.

maker, the indorser will, upon due and reasonable notice given him of the dishonor, pay the same to the indorsee or other holder.

3. *SAME—waiver of presentment and notice, as qualifying character of liability of indorser.* Under the law merchant in force in the State of Indiana, applicable to a note payable in a bank of that State, where there is an express waiver, in writing, by the indorser, of presentment for payment and of notice of its non-payment, the indorser's obligation for its payment is unconditional and absolute, and on the maturity of the note the holder may immediately bring suit against the indorser, without performance of any act.

4. An indorser may, by the form of his indorsement, make himself absolutely and positively, in all events, liable for the payment of the note, with or without due presentment or due notice of non-payment. If there is an agreement, in writing, to dispense with any demand upon the maker, or with notice of dishonor, the language will be construed to import an absolute dispensation with the ordinary conditions of an indorsement, and the indorser will become as absolutely bound to pay the same, when due, as if a guarantor or surety.

5. *ADMINISTRATION OF ESTATES—as to claims not due—estate of indorser of promissory note.* Under section 67, chapter 3, of the Revised Statutes, relating to the administration of estates of deceased persons, the indorsee of notes not yet due, where the liability of the indorser was absolute and not dependent upon any conditions, may have the same allowed against the estate of the latter, allowing the proper rebate of interest. Such indorsee or holder of the notes is a creditor of the estate, within the meaning of the law.

6. A, on January 1, 1881, sold a tract of land in the State of Indiana to B, for \$8000, of which \$500 was paid, taking notes for the balance, payable in one, two, three, four, five, six, seven, eight, nine and ten years, bearing eight per cent per annum interest, secured by mortgage on the premises sold, the last six of which the payee indorsed in blank to C. The notes provided that the drawers and indorsers severally waived presentment for payment, protest and notice of protest, and non-payment thereof, and they were made payable at a bank in Indiana, in which State they were so assigned. A statute of that State provided that notes payable to order or bearer in a bank in such State, should be negotiable as inland bills of exchange, and that the payees and indorsees thereof might recover as in a case of such bills, and the Supreme Court of that State held that the provisions of the law merchant in regard to the presentment for payment and notice of protest and non-payment might be waived by the terms of the contract, and that such waiver extended to the indorsers. A, the payee, died, and his administrator sold the other notes to a third person, who foreclosed the mortgage, making the mortgagor, B, and C, parties defendant. The sale only paid C \$500 of the notes held by him. A decree was rendered

Briefs of Counsel.

against B for the sum due on the other notes, on which an execution was returned *nulla bona*: *Held*, that the estate of A was liable to C on the notes so indorsed to the latter, notwithstanding they were not due at the time of filing the same.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Edgar county; the Hon. C. B. SMITH, Judge, presiding.

Mr S. S. WHITEHEAD, for the appellant:

The contracts in this case were executed in the State of Indiana, in which State the notes are commercial paper, and negotiable as bills of exchange. Stat. of Indiana, 1881, sec. 5506.

The provisions of the law merchant in regard to the presentation for payment, and notice of protest and non-payment, may be waived by the terms of the contract, and such waiver extends to the indorsers. *Norvell v. Hittle*, 23 Ind. 346; *Neal v. Woods*, id. 523; *Lowery v. Steele*, 27 id. 168; *Hays v. Fitch*, 47 id. 21; *Henderson v. Hackelmire*, 59 id. 540; *Booker v. Morris*, 61 id. 286.

As the waiver appears in these notes, the decedent was immediately, directly and primarily liable on the notes at their maturity, without any preliminary acts on the part of their holder, and suit might be brought against him alone, or jointly against him and the maker. Stat. of 1881, sec. 5516; *Morrison v. Fishall*, 64 Ind. 117; 23 id. 346.

The contract of indorsement is a contract to pay money, by the laws of Illinois as much as it is in Indiana. Rev. Stat. chap. 98, p. 771.

Messrs. GOLDEN & HAMILL, for the appellees:

Demand and notice are not necessary when waived in the notes. (*Booker v. Morris*, 61 Ind. 286.) But there is nothing in the terms of the notes in this case that entitles the holder to bring suit against the indorser before their maturity. As

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to the indorser of commercial paper there can be no acceleration of payment, unless there is a breach of one or more of the well-known warranties implied in an indorsement. The warranties implied in an indorsement of the class of paper mentioned, are as follow: First, that the paper will be paid according to its purport; second, that it is, in every respect, genuine; third, that it is valid; fourth, that the ostensible parties are competent to contract; fifth, that the indorser has lawful title and the right to indorse. 1 Daniell on Neg. Inst. secs. 669, 675.

It can not be claimed, with even a shadow of truth, that either of the foregoing warranties has been violated in this case. If other warranties exist in Indiana under the contract of indorsement, it is confidently asserted that they do not attach to paper governed by the law merchant.

Only those promissory notes which are payable to order or bearer, at a bank in Indiana, are made negotiable as inland bills of exchange. A note payable to bearer, but not at such a bank, is subject to all defences of the maker. *Woodward v. Mathews*, 15 Ind. 339; *Rawlings v. Fisher*, 24 Ind. 52.

Such notes only are governed by the law merchant as are payable to order or bearer in a bank of that State. *Brouse v. Bunn*, 16 Ind. 406; *Clark v. Carey*, 63 id. 105; *Bremmerman v. Jennings*, 60 id. 105; *Murphy v. Lucas*, 58 id. 360.

The indorser in this case is not liable until the maker fails to pay the notes, and he is not in default until they become due. When due he may pay them, so that the liability of the indorser is conditional.

Mr. CHIEF JUSTICE SHELDON delivered the opinion of the Court:

On January 1, 1881, Clemuel R. Stevens, deceased, sold a farm in Sullivan county, Indiana, to one Samuel H. Kisner, for an agreed consideration of \$8000. The sum of \$500 was paid in cash, and for the remainder of the purchase money

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Kisner executed his notes to Stevens, payable in bank, in one, two, three, four, five, six, seven, eight, nine and ten years after date, with interest payable annually, at the rate of eight per cent, and secured the payment of the same by mortgage on the premises purchased. Afterwards, Stevens purchased of Richard Dunnigan some land situate in Clark county, Illinois, and in payment therefor transferred to Dunnigan, by indorsement in blank, six of the Kisner notes, the ones falling due January 1, 1886, and after. Stevens died, and after his death his administrator sold the remaining notes,—the ones falling due January 1, 1882, 1883, 1884 and 1885,—to one John J. Brake. The notes maturing up to January 1, 1884, remaining unpaid, Brake commenced proceedings to foreclose the mortgage aforesaid, in the circuit court of Sullivan county, Indiana, making Kisner and Dunnigan the only parties defendant. Dunnigan filed an answer, also a cross-complaint, claiming an interest in the mortgaged property. A judgment of foreclosure was rendered, finding that the mortgaged property was not susceptible of sale in parcels, and directing that it be sold as a whole, and the proceeds applied, first, to indebtedness due; second, to that not due, with a rebate, etc. A sale under this judgment resulted in only enough to satisfy the Brake notes, and pay the sum of \$500 on the notes held by Dunnigan. A personal judgment in the foreclosure suit was rendered against Kisner, and an execution issued thereon was returned no property found. Dunnigan filed his claim against Stevens as indorser of the notes so indorsed by him to Dunnigan, for allowance against the estate of Stevens, in the county court of Clark county, where the claim was disallowed. On appeal to the circuit court there was judgment given against the administrator for \$560, the amount of interest due on the notes, and that Dunnigan pay the costs in the proceeding, the claim having been filed subsequent to the time appointed by the administrator for the presentation of claims against the estate. The judgment of the circuit court was

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affirmed by the Appellate Court for the Third District, and this writ of error is brought to reverse the judgment of the Appellate Court.

The following is a copy of one of the notes in question, and the indorsement:

"\$500.00. TERRE HAUTE, IND., January 1, 1881.

"Five years after date I promise to pay to the order of Clemuel R. Stevens, at P. Shannon's bank, Terre Haute, Ind., \$500, value received, without any relief from valuation and appraisement laws, with interest at eight per cent per annum from date until paid, and attorneys' fees.

"The drawers and indorsers severally waive presentment for payment, protest and notice of protest, and non-payment of this note. Interest payable annually.

No. 5.

SAMUEL H. KISNER."

Indorsed, "C. R. STEVENS."

The notes are all alike, except in amount and time of payment, the others being for \$700 each. The notes and the indorsements were both made in the State of Indiana.

The statute of Indiana at the time provided as follows: "Notes payable to order or bearer in a bank in this State shall be negotiable as inland bills of exchange, and the payees and indorsers thereof may recover as in case of such bills." It is held by the Supreme Court of Indiana that the provisions of the law merchant in regard to the presentment for payment and notice of protest and of non-payment, may be waived by the terms of the contract, and that such waiver extends to the indorsers.

Our statute concerning the settlement of the estates of deceased persons provides: "Any creditor whose debt or claim against the estate is not due, may, nevertheless, present the same for allowance and settlement, and shall thereupon be considered as a creditor under this act, and shall receive a dividend of said decedent's estate, after deducting a rebate of

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interest for what he shall receive on such debt, to be computed from the time of the allowance thereof to the time such debt would have become due according to the tenor and effect of the contract." (Rev. Stat. sec. 67, chap. 3.) And section 70 declares that all debts and demands not exhibited to the court within two years from the granting of letters of administration shall be forever barred, except as to subsequently discovered assets.

Considerable stress has been laid in argument on the fact of the insolvency of the maker, Kisner,—of there having been personal judgment against him, and his estate exhausted. Under our statute this would be important, as showing diligence to collect of the maker; but the notes and indorsements having been made in the State of Indiana, it is the law of that State which is to govern in respect to the liability of the indorser. The notes being payable in a bank in that State, the indorser's liability, by the statute there, is that which arises under the law merchant. Under that law, the indorsement of a note amounts to a contract on the part of the indorser, that if, when duly presented, the note is not paid by the maker, he, the indorser, will, upon due and reasonable notice given him of the dishonor, pay the same to the indorsee or other holder. (Story on Promissory Notes, sec. 135.) But here there is an express waiver, in writing, by the indorser, of presentment of the notes for payment and of notice of their non-payment. This dispenses with the conditions precedent to the indorser's liability, and makes his obligation for the payment of the notes to be unconditional and absolute. On the maturity of the notes the holder might immediately bring suit against the indorser without performance of any act.

An indorser may, by the form of his indorsement, make himself absolutely and positively, in all events, liable for the payment of the note, with or without due presentment or due notice. (Story on Promissory Notes, sec. 461.) Where there is an agreement in writing to dispense with any demand upon

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the maker, or with notice of dishonor, the language will be construed to import an absolute dispensation with the ordinary conditions of an indorsement. (*Ibid.* sec. 148.) We consider that the indorser, here, by the form of his indorsement, made himself absolutely and positively, in all events, liable for the payment of the notes,—that his liability was as full as that of a surety or a guarantor; and the obligation of a surety or the guarantor of a promissory note is absolute to pay the note. *Hunt v. Adams*, 5 Mass. 519; *Luqueer v. Prosser*, 1 Hill, 256. And see Story on Promissory Notes, secs. 58, 59, and note.

It is said the indorser's contract here was to pay the notes, if, when they became due, the maker did not pay them; and that when the notes were filed the condition had not been met. We do not consider that there is any such distinct condition as thus named—that there is any other condition than what is comprised in presentment for payment and notice of non-payment. The condition, in this respect, as above stated by Story, is, "that if, when duly presented, it (the note) is not paid by the maker," etc. Dispensing with presentment carries with it all condition as to paying on the maker's failure to pay on presentment. And even if the contract were, as thus supposed, to pay the notes if, when they became due, the maker did not pay them, we hardly see how, in respect of liability to the indorsee, that would vary essentially from an absolute promise to pay the notes, or that the notes should be paid. Either form of promise would oblige the payment to be made at maturity, and would create the equal liability of the indorser for their payment at maturity.

It is again said, the maker might pay the notes at maturity, and so the indorser not have them to pay. But this would not be inconsistent with the indorser's liability for the payment of the notes.

The same might be said in respect of a surety or a guarantor, that the principal debtor might pay the debt on its coming due; yet that would not militate against the previous obliga-

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tion of the surety or guarantor to pay the debt. So in the case of several makers of a promissory note, upon the death of one of them the claim of the whole note, we take it, might be filed and allowed against his estate, notwithstanding that on the note becoming due it might be paid by the surviving promisors, or each of them might pay his proportion of it, so that the decedent's estate would have none, or but a proportional part, of the debt to pay.

We think the indorser here undertook that these notes should be paid at maturity; that there was a binding obligation on his part for their payment; that there was no condition or contingency as to the obligation itself, but that it was absolute and positive, and constituted a claim against the estate of the indorser; that it was properly filed, as such, against the estate, and that the rejection of it by the court, except as to the amount actually due, was erroneous. The statute required it to be exhibited to the county court within two years from the granting of letters of administration, or else be forever barred, except as to subsequently discovered assets. The statute is, that "any creditor whose debt or claim against the estate is not due may present the same for allowance and settlement." "A creditor is he who has a right to require the fulfillment of an obligation or contract." (Bouvier's Law Dic.) Dunnigan certainly occupied this position, and he held a claim against the estate not due, bringing himself precisely within the statute:

The judgments of the Appellate and circuit courts will be reversed, and the cause remanded to the circuit court of Edgar county.

Judgment reversed.

Mr. JUSTICE SCHOLFIELD: I am unable to concur in the reasoning in the foregoing opinion. The statute therein quoted, to the effect that "any creditor whose debt or claim against the estate is not yet due may present the same for allowance and settlement," is in derogation of the common law, and, by

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a familiar rule of construction, is therefore to be construed strictly. So construing it, the words, "debts or claims against the estate," must mean existing debts or claims, and not probable future debts or claims. But it is conceded, here, that the contract of Stevens, under the statutes of Indiana, where the notes were made and indorsed, is governed by the law merchant, and that by that law his liability (he having waived presentment and notice) is to pay the notes when due, if Kisner does not pay them then. Kisner is liable, absolutely, to pay the notes, but Stevens is only liable to pay them contingently, upon Kisner's not paying them when due. The difference between the character of liability of Kisner and Stevens is plain and broad. It may be that the day of payment as to Kisner might, in the event of Kisner's death, be accelerated without seriously impairing any right, since it would only affect the question of interest, which the statute equitably provides for. But accelerating the day of payment as to Stevens is a very different thing. He was entitled to the benefit of the chance of Kisner being able to pay the debt at any time until after maturity. Although Kisner may not now be able to pay, it does not follow that he may not be able to pay the notes when due. By this opinion, a liability to pay in the future, upon condition, is converted into a present absolute liability,—a new contract is made for Stevens to which he never gave his assent. This, in my opinion, can not be done.

Mr. JUSTICE MAGRUDER: I concur in the views expressed by Mr. Justice SCHOLFIELD.

Syllabus.

THOMAS H. BUSH *et al.*

v.

JAMES R. STANLEY *et al.*

Filed at Springfield September 27, 1887.

122	406
126	70
129	406
158	331
123	406
163	615
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854	26
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184	76
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1. EVIDENCE AND DEPOSITIONS—*admissibility of depositions after making new parties.* In a chancery case, the court, by an order, found that the original complainant had no such interest in the subject matter as to enable him to maintain the bill, whereupon he was given leave to amend the same by the addition of a new party complainant, and for the filing of cross-bills, but the original bill was not dismissed; and it was ordered, by consent of the parties, that the depositions and evidence before taken, so far as competent, might be read on the final hearing, which was continued: *Held*, that there was no error in admitting such depositions in evidence on the final hearing.

2. SAME—*stipulation that depositions taken may be read.* The parties to a suit in chancery have the right to agree, and have their agreement entered of record, that the depositions and evidence already taken in certain other cases, so far as the testimony is competent, may be read on the hearing, and such an agreement waives all objections to the time and mode of taking the depositions.

3. SAME—*parol evidence—to prove contents of lost deed.* Under the Revised Statutes, chapter 116, section 28, providing that when it is shown orally in court "that the original of any deeds, conveyances or other written record evidence has been lost or destroyed, or not in the power of the party wishing to use it on the trial to produce the same, and the record thereof has been destroyed by fire, or otherwise, the court shall receive all such evidence as may have a bearing on the case, to establish the execution or contents of the deeds, conveyances, records or other written evidence so lost or destroyed," the recollection of witnesses as to the contents of such lost or destroyed instruments is clearly competent, and their recollection may be refreshed by reference to notes taken by them, and known to be correct.

4. SAME—*refreshing witness' recollection.* Where a witness, on his direct examination, simply refers to memoranda to refresh his memory, and then testifies to his recollection thus aided, if such memoranda are given in evidence, on his cross-examination, at the instance of the adverse party, the latter can not complain of their admission.

5. SAME—*land patent, as paramount to certificate of entry.* While the statute makes the official certificate of any register or receiver of a land office of the United States, evidence of certain things, yet it declares that

Syllabus.

the patent issued by the United States shall be deemed and considered a better legal and paramount title in the patentee, his heirs or assigns, than such register's or receiver's certificate.

6. *SAME—certificates of redemption from sale for taxes and special assessments.* The law requires the clerk of the county court to make an entry in the records of his office, of all redemptions from sales of lands for taxes and special assessments, and provides that the books and records belonging to his office, or copies thereof, certified by him, shall be deemed *prima facie* evidence to prove the sale of land, etc., for taxes or special assessments, and the redemption of the same. Certificates of the redemption of land made by such clerk are, within the meaning of the statute, "certified copies of the record of redemption," and are admissible as evidence of redemption.

7. *BANKRUPTCY—who may plead discharge.* A discharge in bankruptcy, like the Statute of Limitations, does not annul the original debt or liability of the bankrupt, but merely suspends the right of action for its recovery. It therefore follows, that no one but the bankrupt can plead his discharge in avoidance of his liability. He may, if he choose, treat his covenants and obligations as still binding upon him.

8. *RESULTING TRUST—when it arises.* Where a party furnishes another with money to enter land for the former, and the latter enters the same in his own name, and afterwards transfers the certificate of purchase to the former, or makes him a deed, which is lost, and the patent is issued to the latter, a resulting trust will arise in favor of the party who furnished the money, and to his grantees, and the court will decree a conveyance of the land accordingly.

9. *SAME—by whom it may be asserted—after discharge in bankruptcy.* The fact that a party who has conveyed property by warranty deed has been discharged as a bankrupt, will not prevent him from maintaining a bill to perfect the title thereto, by establishing a resulting trust in his favor, as against adverse claims, and enjoining an action of ejectment by the holder of the legal title against those claiming under his deed.

10. *SAME—adjusting equities—the trustee excluded.* A decree on a bill to establish and enforce a resulting trust, found that S., one of the parties, owned the land, subject to a mortgage to C.: *Held*, that the defendant (the trustee) had no interest in adjusting the equities and priorities between S. and C.

11. *LACHES—to whom availing.* The doctrine of *laches*, in respect of the assertion of ownership of land, can be invoked only by one in possession against one out of possession.

APPEAL from the Superior Court of Cook county; the Hon. **GEORGE GARDNER**, Judge, presiding.

Statement of the case.

This was a bill in equity, to declare a resulting trust, compel the conveyance of the legal title, and enjoin the prosecution of an action of ejectment, exhibited in the Superior Court of Cook county, by John L. Wilson, against Thomas H. Bush, Isaac K. Palmer, Isaac R. Hitt, the city of Chicago, Thomas Fast and Lucy Bush.

It was alleged that on the 28th of January, 1836, John L. Wilson furnished Isaac K. Palmer the money wherewith to purchase from the government of the United States, for said Wilson, the east half of the south-east quarter of section 34, town 38 north, range 14, east of the third principal meridian; that Palmer purchased the land, took a receipt from the receiver of the United States land office therefor, and on the same day assigned the same to Wilson, intending thereby to transfer the land to him; that on the 2d day of February, 1836, Wilson sold the land to Charles Petit, and transferred to him the receiver's receipt so assigned. It is then alleged, upon information and belief, that the receiver's receipt was lost or destroyed after its delivery to Petit, and that it was never returned to the United States land office; that the patent for the land was therefore issued by the government of the United States to Isaac K. Palmer on the 1st of October, 1839, but it remained in the land office until April, 1874, when it was delivered to Isaac R. Hitt, as agent for Averill & Armstrong; that Wilson gave Petit a warranty deed for the land, the consideration being \$250, and Petit's title has become vested in the city of Chicago, Isaac R. Hitt, or both of them; that about forty years after the purchase of the land from the government, Palmer discovered that the patent had been issued in his name, and on or about April 5, 1875, he made an agreement with Bush, whereby Bush was to take all necessary steps to establish the title in Palmer, and get possession of the land, and Bush was to have one-half of the land. Palmer, at the same time, quitclaimed to Bush. It is then charged that Bush purchased with full knowledge of the facts; that on July 17,

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1875, Bush commenced an ejectment suit against Hitt and the city of Chicago, and recovered a verdict, and at the time the bill was filed there was pending a motion for a new trial; that on the trial of the ejectment suit the defendant had offered to prove the facts set forth above, but such evidence was excluded from the jury as not constituting a legal defence; that if judgment shall be recovered on said verdict, complainant will become liable to the extent of \$250, and interest, on his covenant of warranty in the deed to Petit, and that the defendants Thomas Fast and Lucy Bush are claiming some interest in the land. The prayer is, that the ejectment suit may be enjoined, and Bush and Palmer decreed to convey, in trust, to Wilson, for his grantees.

The bill was amended on the 20th of March, 1878, by making John C. Palmer, R. J. O. Hunter and E. M. Hill defendants.

Hill, the Bushes and the Palmers filed an answer, to which the complainants filed a replication on the 13th of April, 1878. At the January term, 1881, of the court, the answer was amended, setting up that Wilson was discharged from liability on his covenants by virtue of proceedings under the Bankrupt law of 1841.

A supplemental bill was filed on the 22d of May, 1882, alleging that since the filing of the original bill,—namely, on the 29th of January, 1881,—the title which had been vested in Hitt had passed by conveyances, particularly specified, to James R. Stanley. Stanley answered on the same day, admitting, substantially, the allegations of the bill, and on the same day the city of Chicago and said Stanley filed their cross-bill in the case, repeating, in substance, the allegations of the original bill in respect to the purchase of the land by Palmer for Wilson, and averring that Palmer either quitclaimed to Wilson or assigned the certificate of purchase; "that complainants are unable to state, from all the information which they can obtain, whether said land was conveyed by Palmer to Wilson by quitclaim deed, or whether said certificate was assigned, but,

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from all the facts they are able to learn, they aver and allege that said certificate was assigned." They allege that the certificate of purchase was lost or destroyed, but they did not know how; that Wilson gave Petit a general warranty deed, among the covenants wherein was one covenanting to warrant and defend the title and the quiet and peaceable possession of the property, etc., and that by *mesne* conveyances, "all the title which Wilson or Petit had in and to said land has become and now is vested in the city of Chicago and James R. Stanley, and that Wilson's covenants, which run with the land, are vested in the city of Chicago and James R. Stanley, and that by *mesne* conveyances from Petit, complainants will have a right of action against Wilson on the covenants in the deed from him to Petit, in case Bush should recover in the ejectment suit. Process was prayed against the Bushes, the Palmers, Wilson, Hitt, Fast, Hunter, Hill, McPherson and Charles B. Lawrence, and the prayer is that the ejectment suit be enjoined, and that the defendants be decreed to convey to Stanley, to be by him held subject to the mortgage in favor of the city. Answers were filed to the cross-bill.

On the 12th of June, 1882, the court made this order:

"This cause coming on to be heard upon the bill, answer, replication and proofs, and it being admitted by the parties hereto that said John L. Wilson was discharged as a bankrupt in the year 1841, under the Bankrupt law then in force, the court finds that he has no interest in the premises in controversy upon which to sustain the bill herein, and on motion of said complainant, leave is given to him to amend said bill by the addition of a new party complainant, and also, on motion of the city of Chicago, one of the defendants herein, said city is given leave to file a cross-bill herein, with James R. Stanley as co-complainant in said cross-bill; and said city moves for a continuance of the injunction heretofore granted herein, which motion is granted by the court, upon condition that said Stanley, by the 30th of June, A. D. 1882, file a new in-

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junction bond herein, in the penal sum of \$1000, with surety to be approved by the clerk of this court, conditioned as required by statute, for the payment of damages, and also expressly conditioned for the payment of the rents upon said property from the time of filing the cross-bill.

"It is further ordered, that this order be entered as of the January term, A. D. 1882, of this court.

"It is further ordered, by consent of parties, that the depositions and evidence heretofore taken or heard in this case, or in the former case of *Hitt v. Bush*, (chancery,) or *Bush v. Isaac R. Hitt and the City of Chicago*, so far as such testimony is competent evidence, may be read on the hearing of this cause, and the further hearing of said cause is continued."

Charles B. Lawrence died testate, and his sole devisee and executrix was made a party in his stead.

On the 30th of July, 1886, final decree was entered, finding that the averments in the original and cross-bills were true; that Palmer, as agent for Wilson, and with his money, entered and purchased the land in controversy from the United States, and assigned the certificate of entry to Wilson, and thereby directed the patent to be issued to Wilson, but that said certificate was lost or destroyed, so that the patent was made out to Palmer, and conveyed to him the legal title, which he holds in trust for Wilson and his grantees; that Stanley is entitled to have the legal title, subject to the mortgage in favor of the city, and it is directed that conveyance be made accordingly. It is also recited and decreed as follows:

"And it appearing to the court that certain of said defendants have paid for the redemption of said premises from a sale for certain assessments upon said premises, to-wit, that Thomas H. Bush has paid the sum of \$268.83, and John C. Palmer has paid the sum of \$1330.73, and the said Margaret Lawrence has paid the sum of \$472.51, and the said Susan M. McPherson has paid the sum of \$630.03, which payments were made on the 30th day of August, 1884, therefore it is

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further ordered, that upon the payment of the costs of this suit, as heretofore ordered, and the delivery, by said Thomas H. Bush, John C. Palmer, Margaret Lawrence and Susan M. McPherson, to the clerk of this court, of their deed or deeds of conveyance, as hereinbefore ordered, and notice thereof to the said James R. Stanley, or his solicitor, Harvey B. Hurd, that the said Stanley pay into the hands of the clerk of this court, within ten days after such notice, the amounts of the said secured sums, with interest thereon from August 30, 1884, at the rate of six per cent per annum, for the benefit of said defendants, the same to be paid to them by said clerk, on the performance, on their part, of so much of this decree as pertains to them, respectively, and in default of such payment the said defendants have execution therefor against said James R. Stanley."

The errors assigned are:

First—The Superior Court of Cook county erred in rendering the decree aforesaid, in manner and form aforesaid, both as to the original and cross-bills.

Second—In not rendering a decree dismissing said bill and cross-bill, and each of them, for want of equity.

Third—In rendering said decree in manner and form aforesaid, without determining who held title paramount to that of appellants.

Fourth—In admitting improper, incompetent and irrelevant evidence on behalf of complainants in the original bill, and likewise in the cross-bill, and each of them.

Fifth—In refusing to hear evidence which was offered by defendants in the original and cross-bills, and appellants herein, which was proper, competent and relevant to the issues.

Appellees assign the following cross-error: "The Superior Court erred in receiving certificates of redemption from pretended tax or assessment sales, and requiring money to be paid to appellants, respectively, for redemption from such pretended sales."

Brief for the Appellants.

Messrs. COOK & LAWRENCE, and Messrs. JUDD, RITCHIE, ESHER & JUDD, for the appellants:

The evidence is not sufficient to establish a resulting trust. Although the payment of the money may be shown by parol, yet it must be plainly proved by direct and unequivocal evidence. Browne on Statute of Frauds, sec. 91; *Dorsey v. Clarke*, 4 H. & J. 557; *Sewell v. Baxter*, 2 Md. Ch. 457; *Faringen v. Ramsey*, 2 id. 375; *Holida v. Shoop*, 4 Md. 474; *Baker v. Vining*, 30 Me. 126; *Boyd v. McLean*, 1 Johns. Ch. 590; *Enos v. Hunter*, 4 Gilm. 219; Bigelow on Fraud, 489; *Cutter v. Tuttle*, 19 N. J. Eq. 560; *Malin v. Malin*, 1 Wend. 648; *Henneke v. Floring*, 114 Ill. 558; *Clement v. Clement*, 1 Jones' Eq. 185; *Lench v. Lench*, 10 Ves. 517; *Kendall v. Mann*, 11 Ala. 18; *Mahoney v. Mahoney*, 65 Ill. 406.

Evidence as to the admissions of the alleged trustee, is viewed with the greatest suspicion, and is seldom accorded much weight. *Gascoigney v. Thwing*, 1 Vern. 367; *Lench v. Lench*, 10 Ves. 517; *Clement v. Clement*, 1 Jones' Eq. 585; *Grover v. Grover*, 3 Y. & J. 170; *Johnson v. Filson*, 118 Ill. 219.

The evidence of Jones, Hitt, Wilson and Porter should have been excluded on the hearing of the cross-bill. Stanley not being a party when they were taken, they could not be used against or for him. 1 Daniell's Ch. Pr. *868, 869; Freeman on Judgments, sec. 162; 2 Phillips on Evidence, *9; *Akins v. Humphrey*, 1 M. & R. 523; Weeks on Depositions, sec. 476.

That portion of Hitt's testimony as to the contents of the deeds, etc., in the chain of title, was still further objectionable. He was not a maker of abstracts. His memoranda were not made from the original deeds, but from the records. *King v. Worthington*, 73 Ill. 161; *Compton v. Randolph*, 104 id. 555.

If Palmer either assigned the certificate of entry, or deeded this land to Wilson, then there is not the slightest need here for the interposition of a court of equity. Starr & Curtis' Stat. 1082, sec. 20; *French v. Spencer*, 21 How. 236; *Cavender*

Briefs for the Appellees.

v. Smith, 3 G. Greene, 350; 5 Iowa, 188; *Magruder v. Esmay*, 35 Ohio St. 221; *Simmons v. Waggoner*, 101 U. S. 260; *Rogers v. Brent*, 5 Gilm. 573; *McConnell v. Wilcox*, 1 Scam. 367.

Mr. H. B. HURD, for the appellee Stanley:

As to the question of *laches*, see Angell on Limitations, sec. 390; *Owens v. Crow*, 62 Md. 491; *Dow v. Jewett*, 18 N. H. 340; Perry on Trusts, sec. 141.

Under the stipulation the depositions of Jones, Hitt, Wilson and Porter were properly admitted.

It was competent, at common law, to prove the contents of the destroyed records, by oral testimony. 1 Greenleaf on Evidence, sec. 509.

The assignment of a receiver's certificate was not a conveyance of the land. *Welch v. Dutton*, 79 Ill. 465.

Messrs. BARNUM, RUBENS & AMES, and Mr. EDWARD ROBY, for the city of Chicago:

Until the patent issues, the legal title remains in the United States. *Irvine v. Marshall*, 20 How. 566; *Wilcox v. Jackson*, 13 Pet. 498.

As to jurisdiction of a court of equity, see *Patterson v. Winn*, 11 Wheat. 383; *Doswell v. De La Lanza*, 20 How. 33; *Bagnel v. Broderick*, 13 Pet. 450.

A bankrupt may ratify the original contract, and revive it and keep it in force, notwithstanding his discharge. *Underwood v. Eastman*, 18 N. H. 582; *Fleming v. Hayne*, 1 Starkie N. P. 296; *Brix v. Braham*, 1 Bing. 281; *Alsop v. Brown*, 1 Doug. 192.

Wilson, by filing the original bill, acknowledged his liability on his covenants of warranty, and waived his privilege. The privilege is personal, and can not be invoked by a third person.

The depositions were properly admitted in evidence, being properly taken. The certificates of redemption were not competent evidence, no foundation having been laid for them.

Opinion of the Court.

Per CURLAM: In order to determine what evidence is properly before us for consideration, it is necessary that we first pass upon the errors assigned in regard to the rulings upon evidence.

First—It is contended the court erred in admitting in evidence the depositions of Jones, Hitt, Wilson and Porter, on the hearing of the cross-bill. This, in our opinion, admits of two answers:

1. There was no decree dismissing the original bill, and the final decree recites that the cause came on for trial "upon an amended bill and supplemental bill of the said John L. Wilson," and the pleadings responsive thereto, and on the cross-bill of the city of Chicago, etc. The court, in the previous order, made on the 12th of June, 1882, it is true, recited that it found that because Wilson was discharged as a bankrupt in the year 1841, under the Bankrupt law then in force, "he had no interest in the premises in controversy upon which to sustain the bill herein;" but it was only decreed, as a result of that finding, that leave be given to amend the bill by the addition of a new party complainant, and also that leave be given to the city of Chicago and Stanley to file cross-bill, etc., and so the original bill, as amended, was still before the court. It is obvious that if the court was mistaken as to the effect of the discharge in bankruptcy upon Wilson's standing in the case, and if, notwithstanding such discharge, he retained such an interest in the property in controversy as enabled him to maintain the original bill, it is unimportant whether these depositions were properly admissible to prove the allegations of the cross-bill, since the decree, so far as affects the interests of these appellants, must be the same, whether it shall be considered as under the original bill or under the cross-bill. That the court was mistaken as to the effect of the discharge in bankruptcy upon Wilson's standing in the case, we think can admit of no doubt. We said in *Marshall v. Tracy*, 74 Ill. 379: "The doctrine best sustained by authority is, that the original

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cause of action is not destroyed by the discharge in bankruptcy. The bar which the discharge interposes may be removed by an unconditional new promise, and debt revived upon the original consideration." And this was re-affirmed in *Classen v. Schoenemann et al.* 80 Ill. 304. The discharge is analogous, in effect, to the Statute of Limitations, in so far as it does not annul the original debt, but merely suspends the right of action for its recovery. (*F. and M. v. Flint*, 17 Vt. 508; 44 Am. Dec. 351.) It follows, necessarily, that the privilege is purely personal to the bankrupt, and if he does not choose to avail of it, no one else can do it for him. Wilson here had the undoubted right to treat the covenant as binding upon him, notwithstanding his discharge, and having done so, he has now the same interest in the property that he had when he made his covenant.

2. The record recites that "it is further ordered, by consent of parties, that the depositions and evidence heretofore taken or heard in this case, or in the former case of *Hitt v. Bush*, (chancery,) or *Bush v. Isaac R. Hitt and the City of Chicago*, so far as such testimony is competent evidence, may be read on the hearing of this cause." The parties were then all before the court, Charles B. Lawrence being one of the solicitors, and no reason is pointed out why they might not agree as to what should be read in evidence. This agreement plainly waives all objections to the time and mode of taking these depositions, and that includes the objection now urged.

Second—It is next contended that the court erred in admitting in evidence certain portions of the testimony of Hitt and Jones, as to the contents of deeds, etc., in the chain of title, because the memoranda which were testified to by them were not made as abstracts of title. The objection can not, in our opinion, be sustained. It is provided by section 28, chapter 116, of the Revised Statutes of 1874, that in cases like the present, where it is shown, as it here was, orally, in court, "that the original of any deeds, conveyances, or other written record evidence, has been lost or destroyed; or not in the power

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of the party wishing to use it on the trial to produce the same, and the record thereof has been destroyed by fire, or otherwise, the court shall receive all such evidence as may have a bearing on the case, to establish the execution or contents of the deeds, conveyances, records or other written evidence so lost or destroyed." The recollection of witnesses as to the contents of such lost or destroyed instruments would clearly be competent under this section, and we perceive no reason why their recollection might not be refreshed by reference to notes taken by the witnesses, and known to be correct. (Greenleaf on Evidence, sec. 430.) The memoranda of the witnesses were not read in evidence on their direct examination, but, as we understand the record, the witnesses simply refreshed their memories by referring to them, and then testified to what they recollect. The memoranda of Jones were, on his cross-examination, given in evidence at the instance of one of the counsel for the appellants, but for that error, of course, appellants can not complain.

Third.—This brings us to the vital question in the case,—does the evidence establish a resulting trust? Wilson testified that he procured Isaac K. Palmer to enter this land for him; that he gave Palmer \$100 wherewith to enter the land; that Palmer entered it, and afterwards transferred it to him by assigning the certificate of purchase or making him a quitclaim deed,—he is not certain which. He adds: "I got Palmer to enter it, because I wanted to show that I paid him more than \$100 for it, because you could go and enter up all the land around there you were a mind to, at that time, for \$1.25. I recollect giving him the \$100 to go and enter that particular piece of land with, just as well as if it had been an hour ago." This evidence is nowhere disproved. Palmer, when first applied to, denied that he ever owned the land, and then offered to quitclaim to Wilson upon being assured of his identity, but after being interviewed by Bush he seems to have argued himself into the belief that the land must have been entered for him by a partner named George; but he distinctly states that

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he has no recollection at all of the entry. He argues, simply, that this or that must have been so because of other facts stated by him, but does not state a single fact in regard to the entry as of his own knowledge. Such testimony is insufficient to prove anything. Wilson is corroborated by these circumstances. The land was entered on the 28th day of January, 1836, and on the 2d day of February, of the same year, he sold and conveyed it to Charles Petit. Palmer never made any claim to the land for a period of forty years, lacking only a few months, and then only after his attention was called to it by other parties. He gives, as an excuse, that he became insolvent about 1837-8, and left Chicago in 1841, and always supposed that all the land he had in Cook county had been sold. But that did not affect his recollection of the property he did unquestionably own in Cook county. He describes that property from memory, and shows how he acquired it, but he has no recollection at all of this land. In showing how he acquired other property, and what money he had, he always shows, inferentially, that he could not have had the money wherewith to purchase this land.

We do not think it needful to discuss the evidence on this question further, but deem it sufficient to say that it has all been carefully examined and considered, and we are of the opinion that it clearly sufficiently establishes a resulting trust.

Fourth—But counsel interpose the *laches* of Wilson, and those claiming in right of him, as a bar to relief. But appellants have not been, nor has any one under whom they claim ever been, in possession of the land. The doctrine of *laches* can only be invoked by one in possession against one out of possession.

Fifth—It is objected that if it be true that Palmer either assigned the certificate of entry or deeded this land to Wilson, then there is not the slightest need for the interposition of a court of equity. While it is true that section 20, of chapter 51, of the Revised Statutes of 1874, makes the official certifi-

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cate of any register or receiver of any land office of the United States evidence of certain things, the 21st section of the same chapter provides that "a patent for land shall be deemed and considered a better legal and paramount title in the patentee, his heirs or assigns, than the official certificate of any register of a land office of the United States, of the entry or purchase of the same land."

Sixth—It is objected that the decree does not establish title either in Stanley or the city of Chicago. The decree finds that Stanley owns the land, subject to the mortgage of the city. We fail to perceive how appellants have any interest in the question of priority between these parties.

Seventh—The cross-error raises the question of the admissibility of the certificates of deposit for redemption. We think they were properly admitted in evidence. It is provided by section 197, chapter 120, of the Revised Statutes of 1874, that "when any tract or lot shall be redeemed from tax sale, the clerk shall enter the name of the person redeeming, the date, and the amount of the redemption, in the proper column. And section 120 of the same statute provides that the books and records belonging to the office of the county clerk, or copies thereof certified by said clerk, shall be deemed *prima facie* evidence to prove the sale of any land or lot or taxes or special assessments, the redemption of the same, or payment of taxes or special assessments thereon." We think these certificates are, within the meaning of this section, "certified copies of the record of redemption."

On the whole, we find no cause to disturb the decree below, in any respect. It is therefore affirmed.

Decree affirmed.

Syllabus.

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LEWIS D. LEACH

*v.*THE PEOPLE *ex rel.* O. P. Patterson.*Filed at Mt. Vernon June 20, 1887.*

1. **SPECIAL LEGISLATION**—under constitution of 1848—*township organization and the county court—management of county affairs.* Section 6, of article 7, of the constitution of 1848, which provides that “the General Assembly shall provide, by a *general law*, for a township organization,” etc., relates to the management of the affairs of the several towns of counties adopting the system, and not to the management of the fiscal affairs of counties.

2. The constitution of 1848 provided that as to such counties as might adopt the township organization, the General Assembly *might* dispense with the county court for the management of the county fiscal concerns, and the affairs of such counties *might* be transacted in such manner as the General Assembly should provide. In this the legislature was not restricted to general laws.

3. The adoption of the township system did not necessarily, under this constitutional provision, do away with the county court for the transaction of county business. The management of the county affairs might still be left to the county court, or intrusted to any other tribunal created for that purpose.

4. **STATUTE**—*whether title embraces the subject.* The act entitled “An act to change the time of electing certain officers in a county therein named,” approved February 28, 1867, is in violation of section 23, of article 3, of the constitution of 1848, in not having its subject or main object expressed in its title. The main subject of the act in question was, the change of the composition of the board of supervisors in Wayne county,—to diminish the number of the members of the board as provided by the general Township Organization law, and to change the mode of their election, from towns singly, to groups of towns. This subject was not expressed in the title, nor was it in any way germain to the purpose which was expressed in the title.

5. **OFFICERS DE FACTO**—*validity of their acts—of officers acting under law which is not constitutional.* The acts of *de facto* officers under color of legal title to the offices the duties of which they are assuming to perform, are valid as to the public, and so far as they concern the rights of third persons who have an interest in their acts done.

6. The legislature passed an act which proved to be in violation of the constitution, whereby the management of the affairs of a county acting under township organization was attempted to be taken from the super-

Brief for the Appellant.

visors of the several towns, and vested in a board of supervisors consisting of only five members, instead of fifteen, as before, to be elected in five districts, and hold their offices for four years. Supposing the act to be a valid enactment, such board of five were elected, and for a time acted without question, as the legally constituted tribunal having charge of the county affairs: *Held*, that their acts were valid and binding as those of *de facto* officers under color of office.

APPEAL from the County Court of Wayne county; the Hon. JOHN KEEN, Jr., Judge, presiding.

Mr. B. TOMPKINS, and Messrs. BELL & GREEN, for the appellant:

There can be no *de facto* officer or tribunal to act under the provisions of an unconstitutional act creating an office. *Norton v. Shelby County*, 118 U. S. 425; *Hildreth v. McIntire*, 1 J. J. Marsh. 206.

An unconstitutional act is not a law. It confers no rights, it imposes no duties, it affords no protection, it creates no office. *Norton v. Shelby County, supra*.

An office is a position created by lawful authority, through which ministerial, executive, judicial or legislative duties may be performed for the public. It must be *de jure*.

The office of a court or "board" is but one, although composed of many persons. The constitution of 1848 (sec. 6, art. 7) requires a *general* law for township organization, whereby the county business may be taken from the county court. *People v. Brown*, 11 Ill. 478; *People v. Maynard*, 14 id. 419; *People v. Cochran*, 15 id. 142; *People v. Garner*, 47 id. 246; *Jasper County v. Ballou*, 103 id. 745.

By the vote of the people in 1860, under the general law to organize under township organization for the government of county affairs, it was fixed that the board should consist of fifteen townships, with fifteen supervisors, to constitute the board a *de jure* body. A majority of all the supervisors was necessary to constitute a quorum. The legislature was powerless to provide any other office or board.

Brief for the Appellee.

The assumption of the five persons to act as the board of supervisors of fifteen towns and fifteen supervisors, is but an attempt to create an office by virtue of an unconstitutional act. It is an attempt to destroy the constitutional board, and supply it by creating an unknown office.

If the power is conferred on one set of officials or individuals, it can not act through or by another, or by a different set of officials or persons. *United States v. City of Columbus*, 21 How. 356; *Schuyler County v. People*, 25 Ill. 181; *Clark v. Hancock County*, 27 id. 305; *McClure v. Oxford*, 94 U. S. 429; *Gaddis v. Richland County*, 92 Ill. 119; *County of Jasper v. Ballou*, 113 U. S. 750.

Mr. GEORGE HUNT, Attorney General, for the appellees:

The board of five supervisors were *de facto* officers, whose title can not be questioned collaterally. Both the general law and the law specially applicable to Wayne county, provided for a board of supervisors. The board of supervisors had the same power under one law that it had under the other. The only difference was in the composition of the board and the manner of electing its members. The official body representing the county, and referred to as having such power, both in the general and special act, was not the *member*, nor the *supervisor*, but the *board* of supervisors.

An officer *de facto* is not a mere usurper, nor yet within the sanction of law, but one who, *colore officii*, claims and assumes to exercise official authority, is reputed to have it, and the community acquiesces accordingly. *Hussey v. Smith*, 99 U. S. 20; *Wilcox v. Smith*, 5 Wend. 231; *Gilliam v. Reddick*, 4 Ired. 368; *Brown v. Lunt*, 37 Me. 433; *Railroad Co. v. McPherson*, 35 Mo. 13; *Parker v. Kett*, 1 Ld. Raym. 658.

As to who is an officer *de facto*, and the binding force of his acts as such, see *State v. Anderson*, 1 Coxe, (N. J.) 318; *Commissioners v. Fowler*, 10 Mass. 290; *Fowler v. Bebee*, 9 id. 231; *Parker v. Baker*, 8 Paige, 428; *Laver v. McGlachlin*, 28 Wis.

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364; *In re Boyle*, 9 Wis. 264; *Conover v. Devlin*, 24 Barb. 587; *Burton v. Patton*, 2 Jones' L. 115; *Kimball v. Alcorn*, 45 Miss. 151.

An officer appointed or elected under an unconstitutional law, before the same is adjudged void, is a *de facto* officer. *State v. Carroll*, 38 Conn. 449; *Cocke v. Halsey*, 16 Pet. 71; *People v. White*, 24 Wend. 520; *Carlton v. People*, 10 Mich. 250; *Commonwealth v. McComb*, 56 Pa. St. 436; *In re Ah Lee*, 6 Saw. 410; *Ex parte Strang*, 21 Ohio St. 610; *People v. Bangs*, 24 Ill. 184; *Mapes v. People*, 69 id. 523; *Barlow v. Standford*, 82 id. 298.

Mr. CHIEF JUSTICE SHELDON delivered the opinion of the Court:

This was an application made by the collector of taxes for Wayne county, in this State, for judgment for delinquent taxes against certain real estate of the appellant in that county. The taxes delinquent were levied to pay interest on \$200,000 of bonds, purporting to be bonds issued by Wayne county in 1869, and in January, 1870,—\$100,000 as a donation to, and \$100,000 for the stock of, the Illinois Southeastern Railroad Company, whose railroad runs through said county.

By an act of the General Assembly, approved February 28, 1867, entitled "An act to change the time of electing certain officers in a county therein named," it was enacted "that the board of supervisors in Wayne county shall consist of five persons, to be elected in the following manner, to-wit: The townships of Four Mile, Hickory Hill and Arrington shall constitute the first electoral district of said county, and shall be entitled to one member of said board; the townships of Big Mound, Lamard, Jasper and Barnhill shall constitute the second electoral district in said county, and be entitled to two members of said board; the townships of Leech, Massillon, Mount Erie and Elm River shall constitute the third electoral district in said county, and be entitled to one member of said

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board; the remainder of said Wayne county shall constitute the fourth electoral district, and shall be entitled to one member of said board." The second section provides that the members of the board shall be elected in each district on the first Tuesday in April, 1867, and each four years thereafter. The third section provides for the organization of the board so composed, and that when organized it shall perform all duties enjoined upon, and shall have all the powers and privileges of, the board of supervisors, acting under the general township organization laws of this State, and that any three of the board shall constitute a quorum for the transaction of any business.

The objection taken to the tax is, that the bonds are not valid, their alleged invalidity consisting in their having been issued under authority of this board of supervisors thus constituted. It is contended that the statute aforesaid is unconstitutional.

The county of Wayne was organized under township organization in 1860, under the general law for township organization, with fifteen towns, the general law being in pursuance of section 6, article 7, of the constitution of 1848, as follows: "The General Assembly shall provide, by a general law, for a township organization, under which any county may organize whenever a majority of the voters of such county, at any general election, shall so determine; and whenever any county shall adopt a township organization, so much of this constitution as provides for the management of the fiscal concerns of the said county by the county court, may be dispensed with, and the affairs of said county may be transacted in such manner as the General Assembly may provide."

February 26, 1867, the legislature passed an act chartering the Illinois Southeastern Railroad Company, (2 Private Laws of 1867, p. 750,) and one among its provisions was: That the county board, or board of supervisors, where the county had adopted township organization, of any county through which

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the road might pass, was authorized, under a vote of the people of the county, to donate to the railroad company, towards building the railroad, any sum not exceeding \$100,000, and might order the clerk of the county board, or board of supervisors of the county, to issue bonds of the county to the amount donated. By an amendatory act, approved and in force February 24, 1869, counties through which said railroad should pass were authorized to subscribe to the capital stock of the railroad, and to issue bonds therefor, upon a vote being had in favor thereof. All subscriptions to the capital stock of or donations to the railroad company, theretofore made by any county, were, by this act, legalized.

On February 25, 1868, an election was had upon a call of this board of supervisors, composed of five persons, on two propositions submitted by them,—one to donate \$100,000, the other to subscribe to the stock of the railroad company \$100,000. The vote was in favor of both propositions.

It is insisted that this act in relation to the board of supervisors in Wayne county is a special act, and so in violation of section 6, of article 7, of the constitution of 1848, that "the General Assembly shall provide, by a *general* law, for a township organization," etc. Township organization respects towns, and the conduct of the affairs of towns, not of counties. For management of the latter's affairs there is separate provision from that of township organization. The section itself recognizes the distinction. It provides that whenever any county shall adopt township organization, so much of the constitution as provides for the management of the fiscal concerns of the county by the county court may be dispensed with, and the affairs of the county may be transacted in such manner as the General Assembly shall provide,—that is, that the General Assembly *may*, not *shall*, dispense with the county court for the management of the county's fiscal concerns, and the affairs of the county *may* be transacted in such manner as the General Assembly shall provide,—as they shall provide, unrestrict-

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edly,—not as they shall provide by general law. We do not perceive why, consistently with this section, the legislature might not have declined to dispense with the county court for the management of the fiscal affairs of Wayne county, and have suffered that court to remain as it was, in that respect; or why there might not have been a different body for the transaction of the affairs of Wayne county from such as existed in other counties, or a body differently constituted. By the constitution of 1848 there was no prohibition of the enactment of special or local laws. This act of February 28, 1867, respects only the composition of the board of supervisors of Wayne county, for the management of the affairs of Wayne county. It does not touch the matter of township organization for the transaction of the affairs of towns, and does not, as we conceive, contravene the constitutional provision in respect of a general law for township organization.

There is a particular, however, wherein this law must be regarded as liable to a constitutional objection. The constitution of 1848 contained the provision: "And no private or local law which may be passed by the General Assembly shall embrace more than one subject, and that shall be expressed in the title." (Art. 3, sec. 23.) The title here is, "An act to change the time of electing certain officers in a county therein named." The main subject of the act in question was, the change of the composition of the board of supervisors in Wayne county,—to diminish the number of the members of the board as provided by the general Township Organization law, and to change the mode of their election, from towns singly, to groups of towns. This subject was not expressed in the title, nor was it in any way germane to the purpose which was expressed in the title. To change the time of electing certain officers signified that particular merely,—the change of the time of election,—and did not at all embrace the main object of the law. The title was deceptive and misleading, giving no intimation of the more important purposes of the act. Without disre-

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gard of this constitutional requirement, we do not see that we can do otherwise than to hold this act to be violative thereof, and therefore void. See *The People v. Mellen*, 32 Ill. 181; *The People v. Inst. Prot. Deaconesses*, 71 id. 229; *Middleport v. Aetna Life Ins. Co.* 82 id. 562; *Welch v. Post*, 99 id. 471.

The act then being held to be not valid, does it follow, as contended by appellant, that the acts of the official body elected under the law, in compliance with its provisions, are null and void? This body was the *de facto* board of supervisors of Wayne county, with color of legal title, and it is the well settled principle that the acts of such officers are valid when they concern the public, or the rights of third persons who have an interest in the act done. But it is said that this principle applies only where there is a *de jure* office for a *de facto* officer to fill,—citing the recent case of *Norton v. Shelby County*, 118 U. S. 425, as so holding; and it is insisted there was no *de jure* board of supervisors of Wayne county. Wherever township organization prevails, there is, in every county, a board of supervisors for the transaction of the affairs of the county. The act in question merely changed the number of the members of the board from fifteen to five, and the mode of election from towns singly, to two or more towns unitedly, and the term of office. Nothing was added to or taken from the powers or duties of the board. After the passage of the act there still remained the board of supervisors of Wayne county, the official body for the management of the county's affairs, and the persons elected as members, under the act, went on, under the sanction of the statute, and exercised the powers and duties of the board of supervisors of Wayne county without question. There was no rival board, but it was the sole acting board of supervisors in Wayne county. Were not the public justified in relying upon it as the board of supervisors of Wayne county?

In *Norton v. Shelby County*, *supra*, the opinion in the case of *State v. Carroll*, 38 Conn. 449, is referred to as containing an admirable statement of the law upon the subject of the validity

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of the acts of *de facto* officers. In the *Connecticut case* it was said: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the officer were exercised: First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. * * * Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise,—such ineligibility, want of power or defect being unknown to the public. Fourth, under color of an election or appointment, by or pursuant to a public, unconstitutional law, before the same is adjudged to be such."

It appears to us that the case at bar is one which comes within the category last named. There was such a legal official body known to the law as the board of supervisors of Wayne county, the powers and duties of which official body were in the present case exercised by persons, under color of an election, as members thereof, in pursuance of a public, unconstitutional law. The real cause of complaint is, that the office legally existing was illegally filled. The cases are numerous which hold that the acts of a public officer elected or appointed under an unconstitutional law are valid as respects the public and third persons, a number of which are cited in the case of *State v. Carroll*, and referred to in *Norton v. Shelby County*. In *The People ex rel. v. Bangs*, 24 Ill. 184, a law providing for the election of a judge was held unconstitutional and the election under it void, yet it was said the judge so elected had color of office, no doubt, and acting as he did, under color of office, that his acts were as valid, of course, as if the law had been constitutional. In *Trumbo v. The People*, 75 Ill. 561, a school district

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was held not to be legally established. So far as that alleged district was concerned, there was no such legal school district, and there was no *de jure* office of school director of that alleged school district; yet upon a proceeding to collect a tax levied by persons assuming to be and acting as school directors of the district, the tax was sustained, it being held that the school directors were officers *de facto* by color of an election, and that their acts, when they concerned the public and third persons, were as valid as though they were officers *de jure*,—that in such a collateral proceeding the legality of the formation of the school district could not be inquired into, and that it could only be done by information in the nature of a *quo warranto*.

If the local law providing for the election of five members of the board of supervisors of Wayne county be unconstitutional, then the general law in regard to the board of supervisors remained in force. Under the general law, the town supervisors were members of the board of supervisors by virtue of their office as town supervisors, and under the general law they held their offices until others were elected or appointed in their places, and qualified. The case then would be, that there were two elected sets of members of the board of supervisors of Wayne county,—one of fifteen members, elected under the general law, the other of five members, elected under the local law. There was, all the while, the legally established office or official body of the board of supervisors of Wayne county. And so far as respects the present question, there would not seem to be any substantial distinction between this case and that of *The People v. Bangs*, where there were two elected judges, the one who was rightfully elected, and the one elected under the unconstitutional law, and it was held that the acts of the latter were valid as those of a *de facto* officer. And the same as to the other cases cited and referred to as above mentioned, where there were two officers in respect of the same office, one lawfully elected, the other appointed or elected under an unconstitutional law, and it was held, the latter was a *de facto* officer and his acts were valid.

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It is said that the general law requires a majority of the members to constitute a quorum for the transaction of business, which, in Wayne county, under that law, would be eight, and that five members, under the local law, would not be a sufficient number to form a quorum for the transaction of business. But the question in hand is, whether the members elected under the local law are to be regarded as *de facto* officers. If so, then the board which they constituted would be a *de facto* board, and a majority of its members would constitute a *de facto* quorum. After the passage of this local law, the town supervisors of Wayne county, who, under the general law, by virtue of their office, were members of the board of supervisors, and continued such until others were elected in their places, declined all action as such members, and yielded to the persons elected as members under the local law, as the rightful board of supervisors of Wayne county. The latter, under their election, in pursuance of the act of the General Assembly, entered upon the duties of their office, and went on and exercised the powers and duties of the board of supervisors of Wayne county for years, without question of their right to do so. They had the sole management and transaction of the affairs of the county, and did all the official legislative business of the county which there was done. There was no other official body ready and willing to do it. They were recognized and acquiesced in by all the public as the board of supervisors of Wayne county, and to hold their acts to be invalid would be most disastrous to the public interest, and that of individuals who were justified in relying upon such acts as the acts of the board of supervisors of the county. There are present, here, all the elements which, from considerations of public policy and for the avoiding of public inconvenience, have been recognized as going to make up the character of *de facto* officers, whose acts should be held valid,—as officers, by virtue of an election as such, under an act of the legislature; reputation of being public officers and public belief of their being such; public recognition thereof, and

Mr. Justice MAGRUDER, dissenting.

public acquiescence therein; and action as such unquestioned, during a series of years, with no other body ready and willing to act as the board of supervisors.

We are therefore of opinion that this act of February 28, 1867, in relation to the board of supervisors of Wayne county, even if it be unconstitutional, was sufficient to give color of title that the official board, elected and acting under the law, were officers *de facto*, and that their acts should be held valid, so far as the public and third persons are concerned.

The judgment will be affirmed.

Judgment affirmed.

Mr. JUSTICE MAGRUDER, dissenting:

I do not concur in the conclusion reached by the majority. The bonds in question were issued in 1868 by Wayne county, \$100,000 thereof, as a donation to the Illinois Southeastern Railroad Company, and \$100,000, as a subscription to the stock of that company. They are alleged to be void, on the ground, that the board of supervisors, so called, which issued them, and which submitted the question of their issue to the votes of the people, was an illegal and unconstitutional body, without power to act in the premises.

The charter of the Illinois Southeastern Railroad Company, passed in 1867, did not give the board of supervisors in counties under township organization any authority to subscribe for the stock of the company, or to call an election for the purpose of voting upon the question of such subscription, or to issue subscription bonds; it only authorized the board to issue donation bonds, and to call an election to vote upon the question of making a donation, in any sum, not exceeding \$100,000, to the company to aid in the construction of its road.

By a general law, however, passed November 6, 1849, and entitled "An act supplemental to an act entitled an act to provide for a general system of railroad incorporations," (Sess. Laws of 1849, p. 28,) the legislature authorized any county in the State to subscribe for stock in any railroad company, in

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any sum not exceeding \$100,000, and conferred upon the county court of such county the power to call an election for the purpose of voting for or against such subscription, and to pay the same in bonds of the county. On April 1, 1851, the legislature passed "An act to provide for township organization," and the fifth clause of the 4th section of the 16th article of that act, (Sess. Laws of 1851, p. 51,) contained this provision: "The board of supervisors of each county in this State shall have power, at their annual meetings, or at any other meeting, to perform all other duties, not inconsistent with this act, which may be required of or enjoined on them by any law of this State, to the county courts." The record in this case shows, that the county of Wayne organized under the Township law, and adopted its provisions by a vote of the people of the county in the year, 1860. The duty of calling an election to vote upon the question of subscribing for railroad stock, and of issuing county bonds in pursuance thereof, which had been imposed upon the county court of Wayne county, prior to its organization under the Township law, was not inconsistent with any of the provisions of such law, and, therefore, devolved upon the board of supervisors of that county after its adoption of township organization. *Prettyman v. Supervisors*, 19 Ill. 406.

On February 25, 1868, at an election in Wayne county called by the board of supervisors, two propositions were submitted to the voters and adopted by a majority of the votes cast. One was, that the county should subscribe \$100,000 to the capital stock of the Illinois Southeastern Railroad Company, and issue bonds of the county to pay such subscription. The other was, that the county should donate \$100,000 to said railroad company, and issue donation bonds to pay the same. If the board of supervisors, as then constituted, had any power to submit the question of donation to the voters of the county and to issue donation bonds, it had the same power to submit the question of subscription for stock and to issue subscription

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bonds. Therefore no different rule can be applied in determining the validity of the subscription bonds from that which must govern in considering the validity of the donation bonds.

The seventh section of "An act to incorporate the Illinois Southeastern Railway Company," approved February 25, 1867, and in force February 26, 1867, is as follows:

"Sec. 7. The county court, or board of supervisors (where such county has adopted township organization) of any county into or through which this road or its branch may pass, is hereby authorized and fully empowered to donate to said company, as a bonus or inducement towards the building of said railroad or its branch, any sum not exceeding \$100,000, and may order the clerk of the county court, or board of supervisors, as the case may be, of such county, to countersign and deliver such bonds so issued. * * * *Provided*, that no donation by the county court or board of supervisors of any such county shall be of a greater sum than \$50,000, until after the question of such larger donation shall have been submitted to the legal voters of such county, at an election to be called, conducted, returns made, canvassed and published in the usual manner of calling, conducting, making returns, canvassing and publishing special county elections. * * * And if a majority of the ballots cast at such an election be in favor of donation, it shall be the duty of the county court or board of supervisors of such county so voting to donate some amount, not less than \$50,000 nor more than \$100,000, to said company, and to order the issuing of bonds of the county for the amount so provided." 2 Private Laws of 1867, p. 750.

The power to issue the bonds in question is derived solely and exclusively from this act of February 25, 1867, and from the acts of November 6, 1849, and April 1, 1851, already referred to. The body, upon which the power was conferred by these acts, was the board of supervisors of the county. On February 26, 1867, the board of supervisors of Wayne county was organized and constituted, as provided for in the general

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Township Organization law of the State. (Sess. Laws of 1851, p. 51; Public Laws of Illinois of 1861, p. 216.) By reference to such Township Organization law, as passed in 1851 and amended in 1861, it may be seen what that board was, and how it was composed.

Under the then existing system of township organization, the county was divided into as many towns as there are townships, according to government surveys. The allegations of the petition in this case, which are admitted to be true, show, that Wayne county was divided into fifteen towns. Each town, at the annual town meeting, elected one supervisor, unless the legal voters equalled or exceeded eight hundred, when it was entitled to one additional supervisor. The supervisor was a town officer, and, as such, had important duties to perform. He was required to take an oath of office, and give bond to the town for the faithful discharge of his duties. He received and paid over all moneys, raised in the town for defraying certain town charges. He was obliged to keep an account of his receipts and expenditures, and, annually, to account with the town clerk, and the two justices of the peace of the town, for his disbursements. He prosecuted, in the name of the town, for certain penalties, given to it by law, and process was served upon him in legal proceedings against the town. He and the town clerk and justices of the peace constituted a board of auditors to examine the accounts of the overseers of the poor and the highway commissioners.

The supervisors of the different towns in the county met annually for the dispatch of business, "as a board of supervisors." There was no such officer, as a member of the board of supervisors, who was elected, as such, by the people. The supervisors of the towns, elected as town officers, and not as county officers, met together once a year, and, when they so met, constituted and were known as the "board of supervisors." The board was simply an assemblage of town supervisors. Each supervisor was required to attend this annual meeting

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of the board, and to lay before it certain matters, connected with the interests of his town. The powers of the county, as a body politic, were vested in the board of supervisors. Special meetings could only be held, when requested in writing by at least one-third of the members of the board. A majority of the supervisors of the county constituted a quorum for the transaction of business.

On February 26, 1867, the board of supervisors of Wayne county consisted, under the system here described, of fifteen town supervisors, each elected by one of the fifteen towns, into which the county had been divided. It required eight supervisors to make a quorum. It is manifest, that this board of fifteen supervisors was the board, upon which the power to issue the donation and subscription bonds, now under consideration, was conferred by the acts of the legislature, already referred to.

Thereafter and on February 28, 1867, the legislature passed an act, "approved February 28, 1867," and "in force February 28, 1867," entitled "An act to change the time of electing certain officers in a county therein named." (Public Laws, 1867, p. 102.) Its first section is as follows:

"That the board of supervisors in Wayne county shall consist of five persons, to be elected in the following manner, to-wit: The townships of Four Mile, Hickory Hill and Arrington shall constitute the first electoral district of said county, and shall be entitled to one member of said board; the townships of Big Mound, Lamard, Jasper and Barnhill shall constitute the second electoral district in said county, and shall be entitled to two members of said board; the townships of Leech, Massillon, Mount Erie and Elm shall constitute the third electoral district in said county, and be entitled to one member of said board. The remainder of said county shall constitute the fourth district, and shall be entitled to one member of said board."

The second section provides, that there shall be elected on the first Tuesday in April, 1867, and every four years there-

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after, in each of said electoral districts, "one member of the board of supervisors of Wayne county," who shall each hold their office for the term of four years, etc., except in the second district, etc., which shall elect two members, etc.

The third section provides, that said board shall perform all duties enjoined upon the board of supervisors, acting under the general township organization laws of this State, and shall have all the powers and privileges of boards of supervisors acting under such general township organization laws, and that any three of said board shall constitute a quorum for the transaction of any business.

Section 4 provides, that the members of said board shall each receive such compensation per diem as they may fix, not to exceed four dollars per day, for each day "in which said member shall be engaged in attending said court."

Section 5 provides that said board shall hold at least two meetings in each year, and that any special meeting may be called by any two members, etc.

Section 6 provides, that, in case of any vacancy in said board, the county clerk shall advertise a new election, etc.

Section 7 provides, that "all duties, not herein provided for to be done and performed, by virtue of the township organization laws of this State, by the supervisors of towns, in the different towns, shall be done and performed, in said county, by a justice of the peace in such town, who shall be selected by the town clerk, town assessor and town collector, for that purpose, each year," etc.

Section 8 is as follows: "This act shall be deemed and taken as a public act, and be in force from and after its passage."

Under the provisions of this act, five persons were elected, who proceeded to act as the board of supervisors of Wayne county. It was the board, consisting of these five persons, who called the election, held on February 25, 1868, as above stated, and who issued the bonds in controversy in this pro-

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ceeding. At a special meeting of this board, held on January 18, 1868, and called on petition of two of the five members, the election in question was ordered, as a special election.

The act of February 28, 1867, is claimed to be unconstitutional upon three grounds. *First*, it is said, that the act in question, being special in its character and having never been submitted to the votes of the people, violates section 6 of article 7 of the constitution of 1848, which provides, that "the General Assembly shall provide, by a *general* law, for a township organization, under which any county may organize whenever a majority of the voters of such county, at any general election, shall so determine," etc. (*People v. Brown*, 11 Ill. 478; *People v. Couchman*, 15 id. 142; *People v. Brayton*, 94 id. 341.) *Second*, that the act in question violates the 5th section of the 9th article of the constitution of 1848, which provides, that "the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes," etc. (*Cornell v. People*, 107 Ill. 372.) *Third*, the act is said to be in violation of section 23 of article 3 of the constitution of 1848, a portion of which section is in the following words: "No private or local law, which may be passed by the General Assembly, shall embrace more than one subject, and that shall be expressed in the title."

It is not necessary to express any opinion as to the first and second grounds, upon which the constitutionality of the law is attacked. It is clearly unconstitutional upon the third ground, urged against it. It violates section 23 of article 3, as above quoted. It is a local law. It applies to Wayne county and no other county in the State. It embraces a subject, which is not expressed in its title. It is entitled "An act to change the time of electing certain officers in a county therein named." It does not change the time of electing any officers. It abolishes the office of supervisor of the town, and provides that the duties of town supervisors shall be performed by justices

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of the peace. It creates certain new electoral districts, and provides for the election of members of the board of supervisors, as such. No such official, as a member of the board of supervisors, had theretofore been elected, as such, by the people. Each town supervisor, when meeting with the supervisors of all the other towns in the county, was called a member of the board of supervisors. The five members of the new board were to be elected once in four years, instead of being elected annually. They were, however, new officials, created for the first time by this act. They were not town supervisors, but district supervisors. It is apparent from the most superficial examination, that the title furnishes no information of the subjects, which are embraced in the body of the law. The view, here expressed, is sustained by the following cases: *People v. Mellen*, 32 Ill. 181; *People v. Institution of Protestant Deaconesses*, 71 id. 229; *Village of Lockport v. Gaylord*, 61 id. 276; *Middleport v. Ætna Life Ins. Co.* 82 id. 562; *Welch v. Post*, 99 id. 471.

It is, however, urged, that the five district supervisors, who issued the bonds in question, were officers *de facto*, and that their acts, as such *de facto* officers, are valid and binding, so far as the rights of third persons are concerned. I do not think, that this position is tenable under the facts of this case. There are some authorities, which hold, that an act of the legislature, even if it be unconstitutional, is sufficient to give color of title, and that an officer, acting under it, is an officer *de facto*. But the cases, which lay down this doctrine, will be found, upon a careful analysis, to refer not to the unconstitutionality of the act creating the office; but to the unconstitutionality of the act, by which the officer is appointed to an office legally existing. Such cases apply only to the invalidity, irregularity or unconstitutionality of the mode, by which a party is appointed or elected to a legally existing office. Where an office has been lawfully created, the acts of an incumbent, who holds it improperly, will be considered valid, as being the

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acts of an officer *de facto*. But there can not be an officer *de facto*, where no officer *de jure* is provided for. Before one can claim to be a *de facto* officer of the law, there must be a law creating the office. The office itself must be one *de jure*; the officer may, then, be one *de facto*. There can be no officer either *de jure* or *de facto*, if there be no office to fill. (*Norton v. Shelby County*, 118 U. S. 425; *Town of Deborah v. Bullis*, 25 Iowa, 12; Wait's Actions and Defences, sec. 9). Dillon in his work on Municipal Corporations (3d ed.) sec. 276, says: "The notion, that there can be a *de facto* office has been characterized as a political solecism, without foundation in reason and without support in law; and, therefore, a person can not claim to be a *de facto* officer of a municipal corporation, when the corporation or people have, in law, no power, in any event, to elect or appoint such an officer."

It can not be said of the act of February 28, 1867, that it merely prescribed a new mode of selecting the members of the board of supervisors of Wayne county. It endeavored to form a new board of supervisors, unknown to the Township law, under which Wayne county was organized, and opposed to the spirit and theory of that law. In the place of a board, consisting of fifteen town officers, elected by the fifteen towns of the county, eight of whom constituted a legal quorum, it provided for the organization of a board of five men, elected by five newly created electoral districts, and three of whom constituted a legal quorum. It is apparent from the observations already made, that this act sought to inaugurate a new system of government for Wayne county. It made provision for a set of officials, who, though they were called by the same name as the old board, were yet, in fact, an entirely new governing body.

It follows, that the five men, who issued the bonds under consideration, were not incumbents of offices, already legally existing, and can not be regarded as *de facto* officers. As the act, which attempted to create the board of five district super-

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visors, never became a law, that board never really came into existence. The Supreme Court of the United States say: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County, supra.*

It is further claimed, that the issuance of the bonds, involved in this suit, has been ratified by the legislature in the passage of an act, approved February 24, 1869, and entitled, "An act to amend an act entitled an act to incorporate the Illinois Southeastern Railway Company." (3 Private Laws, p. 308.) The first section of this act provides, that "all subscriptions to the capital stock, or donations, or gifts to said railway company, whether made by individuals, townships, counties or corporations, shall be and are by this act legalized; and the said company is hereby empowered and authorized to collect and use the same upon the conditions as donated and subscribed."

Clearly this first section of the act of 1869 is unconstitutional, as being in violation of section 23 of article 3 of the constitution of 1848, as above quoted. This court said of it in *Welch v. Post, supra*: "The question is directly made, that the amendatory act of 1869 violates the constitution of 1848, article 3, section 23. * * * On the authority of *Middleport v. Aetna Life Ins. Co.* 82 Ill. 562, we are inclined to hold the point is well taken, and, if so, it would be conclusive of the whole case." In *Village of Lockport v. Gaylord, supra*, the act under consideration was an act of the legislature, entitled "An act to amend the charter of the village of Lockport, passed February 12, A. D. 1853," the 6th section of which was as follows: "That the appropriations made by the president and trustees, and orders, drawn by the clerk in February, 1867, be, and the same are, hereby fully legalized in all respects." It was there said: "The legalization of unauthorized acts of the corporation can not be considered to

Syllabus.

be amendatory of its charter. * * * The object of the 6th section is not expressed in the title of the act, and we must hold, that it was passed in violation of the constitution, and is, therefore, void."

There is no difference between the act, which came under review in *Village of Lockport v. Gaylord*, and the act of 1869, now under consideration. The latter act, in its title, purports to amend the charter of the Illinois Southeastern Railway Company. The first section attempts to legalize unauthorized donations and subscriptions. Such legalization is not amendatory of the charter. The object of the first section is not, therefore, expressed in the title of the act. Hence, it must be held to have been passed in violation of the constitution, and is void. Being thus unconstitutional and void, it can not be regarded as a ratification of the illegal acts of the board of supervisors, created by the act of February 28, 1867.

For the reasons here stated I think the judgment of the county court should be reversed.

Mr. JUSTICE SCHOLFIELD: I concur in the foregoing views of Mr. Justice MAGRUDER.

Mr. JUSTICE MULKEY: I fully concur in the dissenting opinion of Mr. Justice MAGRUDER.

THE VILLAGE OF HYDE PARK

v.

NATHAN CORWITH.

Filed at Springfield May 12, 1887.

129	441	
131	539	
129	441	
33a	33	
122	441	
96a	1 25	
122	441	
196	1494	
122	441	
198	1585	
122	441	
e105a	1410	

1. REMEDY—*to recover on judgment of condemnation.* Where an ordinance for the condemnation of land by a village for a street, provides that the entire cost of the proposed improvement shall be paid by special assessments, so long as such ordinance remains in force it excludes every other

Brief for the Appellant.

mode of payment, and an action of debt will not lie on the judgment of condemnation against the village, although it may have taken possession of the land condemned. Such judgment can be paid, if at all, only by special assessments.

2. **RES JUDICATA**—*by decision of this court.* A decision by this court, that *mandamus* will not lie to compel a village to pay a judgment of condemnation of land for a street out of a fund to be raised by a general tax, and that the ordinance under which the condemnation was had is still in force and not repealed, becomes *res judicata* as to such matters, and an action of debt by which it is sought to recover a judgment for the compensation awarded, seeking the same end, can not be sustained.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. SIDNEY SMITH, Judge, presiding.

Mr. HENRY V. FREEMAN, for the appellant:

The special remedy or method of paying for the improvement provided for in the ordinance, namely, by special assessments, is conclusive. *People v. Village of Hyde Park*, 117 Ill. 462; *Village of Hyde Park v. Thatcher*, 13 Bradw. 613; *Smith v. Tripp*, 14 R. I. 112.

To compel a municipal corporation to do an act, the party applying must show a clear right to have the thing done, and that the village has the power to do it in the manner sought. 1 Dillon on Mun. Corp. sec. 89; *People v. Crotty*, 93 Ill. 180; *People v. Hatch*, 33 id. 9; *Commissioners v. People*, 66 id. 339.

A liability to be sued in debt implies a liability to pay a judgment so obtained, and to pay such judgment a general tax must be levied. A tax to pay for an improvement to be paid by special assessment will be illegal.

The evidence fails to show such negligence on the part of the village to levy the special assessments, as will entitle the plaintiff to this action.

Appellee has never requested the village to proceed with the special assessment, and hence this action will not lie for the same reason which forbids *mandamus*.

Brief for the Appellee.

A party can not maintain an action at common law, when he fails to resort to the remedy given him by statute. *Pierce on Railroads*, (ed. of 1881,) 1-178.

The evidence fails to show that the village has ever taken possession of the premises with the owner's consent. Taking possession without his consent is a trespass, and does not divert title. *Dillon on Mun. Corp.* sec. 479, note; *Stewart v. Baltimore*, 7 Md. 500; *Chicago v. Barbier*, 80 Ill. 415.

Mr. CONSIDER H. WILLETT, for the appellee:

The remedy by special assessment, when created, was exclusive. *Pierce on Railroads*, 177; *2 Woods on Railroads*, sec. 245; 67 Ill. 191.

As to the following points possession is the controlling point:

If the ordinance was repealed after possession taken, the judgment became absolute,—the power to proceed by special assessment was gone. *Chicago v. Beaubien*, 80 Ill. 482; *Corwith v. Hyde Park*, 14 Bradw. 635.

If the ordinance was not repealed, the village alone could enforce the remedy by special assessment. If it neglects to proceed in the matter within a reasonable time, this will give the land owner a common law right of action. *Smith v. Railroad Co.* 67 Ill. 191; *Corwith v. Hyde Park, supra*; *Higgins v. Chicago*, 18 Ill. 272; *Wheeler v. Chicago*, 24 id. 105; *Bradford v. Chicago*, 25 id. 349; *Glencoe v. People*, 78 id. 382; *Beveridge v. West Park Commissioners*, 100 id. 75.

What is a reasonable time when the facts are not in dispute is a question of law. *Blackwell v. Foster*, 1 Metc. 88.

Abandonment is a matter of intention, and operates instanter. *Drury v. Ross*, 5 Col. 300.

Whenever conditional judgment has become absolute, by taking possession, debt may be maintained, first, if unreasonable delay exists in enforcing the special assessment; second, if it be abandoned; or, third, if the enabling ordinance is repealed. *Chicago v. Shepherd*, 8 Bradw. 602; *Chicago v. Beau-*

Brief for the Appellee.

bien, 80 Ill. 482; *Chicago v. Palmer*, 93 id. 125; *Corwith v. Hyde Park*, 14 Bradw. 635; *Railroad Co. v. Teters*, 68 Ill. 144; *Wheeler v. Chicago*, 24 id. 105; *Clayburgh v. Chicago*, 25 id. 440; *Wilkerson v. Buchanan County*, 12 Mo. 328; *Harrington v. Berkshire*, 19 Pick. 263; *Forrestville v. Boston*, 121 Mass. 173; *State v. Sap*, 17 Wis. 687.

Cases in which the facts are on all fours with ours, in which relief was granted by a common law remedy: *La Fayette v. Shultz*, 44 Ind. 97; *Fisk v. Newark*, 40 N. J. 11; *Schoolbred v. Charleston*, 2 Bay, (S. C.) 63; *People v. Syracuse*, 78 N. Y. 56; *Iowa v. Keokuk*, 9 Iowa, 438.

Besides the face of the judgment (no costs were recovered) we are entitled to interest at six per cent since the village took possession of the land under the judgment for a street. *Cook v. South Park Commissioners*, 61 Ill. 125; *Chicago v. Palmer*, 93 id. 125; *Railroad Co. v. McClintock*, 68 id. 296; *Beveridge v. West Park Commissioners*, 100 id. 75; Mills on Eminent Domain, sec. 175, and notes; *Appeal of the Borough of Verona*, 108 Pa. St. 83; *Railroad Co. v. Stenier*, 44 Ga. 546; *Shelton v. Kalamazoo*, 24 Mich. 383; *Rex v. Railroad Co.* 3 Ry. Cas. 777; *Bailey v. Carrollton*, 28 La. Ann. 171.

Where contracts provide for payment only from a special assessment, they are upheld as made; yet for any default or unreasonable delay in collecting the special assessments, an action will lie exactly as though the contract contained no such stipulation. *Maher v. Chicago*, 38 Ill. 266; *Chicago v. People*, 56 id. 327; *Baldwin v. Oswego*, 41 N. Y. 132; *Lansing v. Van Gordon*, 24 Mich. 456.

The right of payment where possession was taken, became a vested right to payment, which can be destroyed in no way but by actual payment. *Fletcher v. Peck*, 6 Cranch, 87; *University v. Foy*, 2 Hayn. (N. C.) 310; *Trustees v. Woodward*, 4 Wheat. 518; *Berry v. Randall*, 4 Metc. 292; *Brewer v. Otoe County*, 1 Neb. 373; *Gibbs v. Railroad Co.* 13 S. C. (Shand.) 228; *Hubbard v. Brainard*, 35 Conn. 563.

Opinion of the Court.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This cause has been elaborately argued in behalf of plaintiff, but the view taken by this court can be shortly stated. A succinct account of the transactions, out of which the condemnation judgments arose upon which the action is brought, may be found in the opinion of this court in *The People v. Hyde Park*, 117 Ill. 462. It is in all essential features the same case, except this is an action of debt on the condemnation judgments, and the former case was a *mandamus* to compel the village to pay such judgments out of a fund to be raised by a general tax. Should the present judgment be permitted to stand, the village might be compelled to pay it out of a common fund, to be raised by a general tax upon the property situated within the limits of the village, as any other judgment. It is therefore plain, it is sought to do by this action that which it was decided in the former case could not be done at all,—*i. e.*, to compel the village to pay the condemnation judgments, or, what is the same thing, compel the village to levy a general tax on the property within the village for that specific purpose.

Counsel is in error in assuming the “action of *mandamus* was defeated on the technical ground * * * no proper demand to maintain *mandamus* had been made.” Such was not the case. It was distinctly said that was one of the minor questions in the case, to which no great importance was attached. It is also error to suppose no other questions discussed and decided in that case are *res judicata*. The principal point made was, whether the village could be compelled to pay the condemnation judgments out of a common fund, to be raised by general taxation on all the property of the municipality, and it was held it could not be. Precisely the same argument was then made in favor of the relief demanded as is now made in support of the present judgment. It was then insisted, as is now done, the enabling ordinance under which the proceed-

Opinion of the Court.

ings were originally commenced, was repealed, and that by the act of the village in taking possession of the lands of plaintiff the condemnation judgments became absolute. It was ruled the enabling ordinance was not repealed by the ordinance of July 2, 1877, so far as the land between Forty-first and Forty-second streets is concerned, which is the land in controversy, and that decision is *res judicata*, and is not open for reconsideration in this case. The village board had declared, by ordinance, before anything was done, the entire cost of the proposed improvements should be paid for wholly by special assessments. It was within the legislative authority of the village to so declare, and its discretion in that regard could not be controlled by the courts. That mode of payment for the land proposed to be taken for public use was fixed and determined in advance, by ordinance, and while that ordinance remains in force, as it does, it excludes any other mode of payment. These questions were passed upon by this court in the former case, and it is not necessary to re-state the reasoning by which the conclusions were reached. It is sufficient that under the former decision the condemnation judgments can only be paid, if at all, by special assessment under the original ordinance, which is in force as to them. That being so, the Superior Court should have instructed the jury, as it was asked to do, there could, in law, be no recovery on such condemnation judgments.

The judgments of the Appellate and Superior Courts will be reversed, and the cause remanded to the Superior Court.

Judgment reversed.

Mr. JUSTICE SHELDON, dissenting.

Syllabus.

ERASTUS DEAN *et al.*

v.

192	447
156	500
122	447
162	230

HARRY C. LONG *et al.**Filed at Ottawa November 11, 1887.*

1. **WITNESS—competency—party as against heirs.** The deposition of a party complainant, taken after the death of a defendant, in a bill filed to set aside a deed, and for rents, etc., is incompetent to be read as evidence as against such deceased party's heirs.

2. **TRUST—conveyance in trust—and in whom the legal title will vest.** A land patent from the United States to A and B, trustees for C and her children, C being a married woman and wife of B, conveys only an estate to A and B in trust for C and her children born and thereafter to be born.

3. A conveyance in trust, or to the use of another, which prescribes no duties to be performed by the trustee, but leaves him a mere passive title, vests the legal title in the *cestui que trust*. But this rule does not apply to a conveyance to one in trust for a married woman and minor children incapable of contracting in regard to their property. In such case the legal estate will not vest in the *cestui que trust*, but will vest in the trustee for the *cestui que trust*.

4. **CONVEYANCE—to the grantee "and her children," construed as including after-born children.** A husband, and his son by a former wife, purchased a tract of land, taking the conveyance in their names as trustees for the second wife "and her children." Held, that the words, "and her children," were words of purchase and not of limitation, but to be read conjointly with the name of the mother, and that the transaction being in the nature of a family settlement, provision was intended to be made for after-born children as well as those in being at the time. In such case the trustees hold also for children that may thereafter be born.

5. **NOTICE—from recitals in prior deed.** In all cases where a purchaser of land can not make out a title except by a deed which leads him to another fact, whether by description of the parties, recital or otherwise, he will be chargeable with notice of such other fact. So where his grantor's title papers show that he has only an estate in trust for another, the purchaser will take subject to such trust.

6. **LIMITATION—act of 1839—good faith.** A deed for land taken with notice that the grantor held the title in trust for another, can not avail as color of title under the seven years' limitation law; but a deed from the latter, while claiming title, to another without notice of the defect in his chain of title, is good color of title under such law.

Statement of the case.

Appeal from the Circuit Court of Kane county; the Hon. Isaac G. Wilson, Judge, presiding.

This was a bill in equity, exhibited in the De Kalb circuit court on the 18th day of February, A. D. 1876, by Robert Furniss Long, Elizabeth Long, Harry C. Long, Alicia Lucia Burton, John Burton, Eleanor M. Taylor, Charles A. Taylor, Alice E. Long and Albert D. Long, against Erastus Dean and George M. Hadden, and alleging, in substance, that Robert Whatkinson Long caused to be purchased of the United States the south half of the south-east quarter, and south half of the south-west quarter, of section 36, town 39 north, range 4, in De Kalb county, Illinois, 160 acres; that the money to buy it was furnished by Robert Whatkinson Long, and the purchase was made for the benefit of said Elizabeth Long and her children, and that the title to same was placed in Robert F. Long and Robert Whatkinson Long, in trust for the benefit of said Elizabeth Long and her children, on or about August 1, 1853; that a trust patent of that import was issued by the United States to said parties; that Alicia Lucia Burton, Eleanor Mary Taylor, Alice E. Long, Albert D. Long and Harry C. Long are all the children of Elizabeth Long, and the only children; that Robert Whatkinson Long died in Illinois in 1869, and that he was the step-son of said Elizabeth, and son of Robert Furniss Long, who is the husband of said Elizabeth and the father of all the others above named; that the said children of the said Elizabeth Long are aged, respectively, from twenty-one to thirty-two years of age; that the legal title of said lands was placed in said trustees for the use and benefit of said Elizabeth and her children, and to place it beyond her power to encumber or dispose of it, etc.; that one Erastus Dean is now in possession of the south half of the south-west quarter of said section 36, and claims to be the owner in fee, and that he derived title from one George M. Hadden, and that said Hadden claims to have acquired the title to the same through

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a pretended purchase, etc., made by said Robert F. and Elizabeth Long, but they deny that said Hadden ever had any valid deed, that it is void, etc.; that Hadden knew that the title was a trust title, in said Robert F. and Robert W. Long, exclusively to and for the benefit of the said Elizabeth and her children, and that he could not get a good title, etc.; that the deed was made to said Hadden in payment of money loaned by him to said Robert Furniss Long at usurious rates of interest, and which had been used by him in his individual character, and not in his character as trustee, etc., and that the whole transaction was a fraud and a violation of the trust, etc.; that Hadden went into possession of the said land in the year 1855, and he and his grantees have had possession ever since, and have had all the rents, etc., and that they refuse to recognize the claims of the complainants, etc.; that said Dean knew all about the rights and claims of complainants when he bought it, and took his chances; that it is worth \$50 per acre, and that the rents have been worth \$250 per year, and that they ought to have these rents, and that Hadden and Dean should be made to account, and that they are ready to pay back all the taxes. The bill prays for answer, but not under oath, and that the title in Dean be set aside and declared to be in the complainants, and that an accounting be had of the rents and profits and taxes, etc.

Hadden and Dean answered, jointly and severally, but not under oath, in substance, that Hadden, about the year 1853 or 1854, was induced to buy a note of the said Robert Furniss Long, which said Long claimed to own, against one Shackleton; that Hadden would not buy it, but after repeated solicitations did buy it, on the condition that Long should get it changed so it would run at ten per cent; that he sent away and in a few days came back with the note changed to ten per cent; that Long said he had seen Shackleton, and it was all right, etc.; that Hadden soon learned that Shackleton had not authorized the change, and that Long had made it without the

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assent of said Shackleton; that Hadden then insisted that he secure him, which he did by a bond for a deed and a mortgage, and afterwards, to pay it, Long and wife gave Hadden a deed of the said land; that Hadden had no knowledge whatever of the trust now claimed, and did not know that anybody had any interest in it but the said Long and wife, as said Long stated; claims that the land was in fact bought with the money of said Long, and that his son never paid anything towards it, and that if such patent was so issued, it was so done for some dishonest purpose; that said Long always regarded and treated it as his own, and no one else ever exercised any control over it, and that he was, in fact, the owner; that at the time the said land was entered, several of the complainants were not born; that the statement that the land at that time belonged to the said wife and children, is a cheat and a fraud; that said Robert Whatkinson Long was a rascal, had no money, and had to run the country on account of some rascally work, and if the said patent issued as in said bill stated, it did not give the said wife and children any interest, as it does not describe what is their interest, and also that it was done to cheat creditors, etc.; that said Hadden held the land for two or three years, paid a large amount of taxes, and then sold and conveyed it to said Dean for a valuable consideration, and that said Dean never has received to this day any notice of any such claim; that he at once took possession, and built a house, and has otherwise improved it to a large extent, to the amount of \$5000 or thereabout, and has continued his said possession thence hitherto, and paid all the taxes, etc., to the amount of \$2000 more, and he claims the benefit of the seven years' limitation, etc.; that no taxes have been offered to said Hadden, or to said Dean, as a tender for taxes paid, and they claim that even if the said wife and children ever had any interest in the land, they have long since lost it by *laches*; that all the children are of full age, and have been so for more than three years previous to the filing the said bill, (at least all of them

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that were in existence at the time of the entry of said land,) and that all the parties are estopped, etc.; deny all other allegations in the bill not otherwise answered.

Replication was filed to the answer. The cause was continued, from time to time, until the 26th day of June, A. D. 1882, when, by agreement of parties, the venue was changed to the circuit court of Kane county. Thereafter, on the 11th of December, A. D. 1882, the death of the defendant George M. Hadden was suggested. Subsequently, his heirs-at-law were made defendants, and duly summoned, and a guardian *ad litem* was appointed for the minor defendants, who filed the requisite answer. The cause was then again continued, from time to time, until the 19th day of December, A. D. 1884, when the death of the complainant Robert Furniss Long was suggested.

The cause was heard at the April term, A. D. 1886, of the Kane circuit court, but the court took time for advisement, and, at the next following October term, decree was rendered. The decree finds that the United States, in 1853, conveyed, by patent, the land in said bill mentioned, to-wit, the south half of the south-west quarter of section 36, township 39 north, range 4, east of the third principal meridian, to Robert F. Long and Robert W. Long, as trustees, for the use of Elizabeth Long, wife of Robert F. Long, and her children; that said grantees were naked trustees, having no duties to perform and no trusts to execute, and that the title to said land, immediately upon the issuing of said patent, became vested in said Elizabeth Long and her children, in like manner and to the same extent as if they had been named as grantees in said patent, and they, the said Elizabeth Long and her children, held said lands in fee simple, as tenants in common thereof; that June 13, 1855, the said Elizabeth Long, and Robert F. Long, her husband, joined in a deed of conveyance of said lands, with full covenants of warranty, to George M. Hadden, one of the original defendants herein, whereby the

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said Hadden succeeded to the interest of said Elizabeth Long, and became a tenant in common of said lands with the children of said Elizabeth Long; that January 9, 1865, the said Hadden conveyed, by warranty deed, to the defendant Erastus Dean, the said land, and that said Dean entered into immediate possession of said land, and from thence hitherto continued in such possession; that said Dean, ever since the time of his purchasing and taking possession of said lands, as aforesaid, has in good faith paid all the taxes and assessments on said lands, without any notice of or information (until the commencement of this suit) that the children of said Elizabeth Long, or any other person than said Hadden, had, or claimed to have, any right, title or interest in or to said land; that said Hadden paid all the taxes and assessments on said land, from the time of his purchase thereof, in 1855, to the date of his conveyance of same to said Dean, in 1865; that at the time of the commencement of this suit, the said Henry C. Long was the only one of the children of the said Elizabeth Long who was under the age of twenty-four years, he then being in his twenty-second year; that at the time of the birth of said Henry C. Long, Elizabeth Long had four other children, thus making the share of each child in the ownership of said land one-sixth. It is therefore decreed, that by the conveyance of said Elizabeth Long and her husband to said George M. Hadden, one-sixth of the title to the said lands was vested in said Hadden, and the other five-sixths were vested in the five children of said Elizabeth Long, as tenants in common; that said Elizabeth, having conveyed her interest in said land to said Hadden, had no interest in said land at the commencement of this suit, and that all the other complainants, except the said Henry C. Long, having failed to make any claim or to assert their rights to said land within three years next after their majorities, respectively, were, at the time of the commencement of this suit, barred of all right, claim, title or interest of, in and to said land, and at such time had no

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rightful claim, demand or interest to or in said land, the defendant Dean having, for more than seven successive years prior thereto, been in the actual possession thereof under claim and color of title made in good faith, and during all said time having paid all taxes and assessments levied on said land; and said Dean and said Hadden, under whom he claimed, having been in the actual, exclusive and adverse possession of said land for more than twenty years prior to the commencement of this suit, it is therefore adjudged and decreed that as to all of said complainants, except the said Henry C. Long, the bill be dismissed. The court further finds that the said Henry C. Long, at the date of said patent, was not then born, yet being the child of the said Elizabeth Long, though born subsequent to the date of the patent, and the patent not limiting the grant to the children then *in esse*, it included the said Henry C. Long. It is therefore adjudged and decreed that the said Henry C. Long is the owner of, and entitled to recover, an undivided one-sixth part of said land in fee simple absolute.

By agreement of parties no decree or order was made in respect to rents and profits, which are reserved for future consideration.

The patent for the land reads as follows:

"Whereas, Robert Furniss Long and Robert Whatkinson Long, in trust for Elizabeth Long and her children, of Cook county, Illinois, have deposited in the general land office of the United States a certificate of the register of the land office at Chicago, whereby it appears that full payment has been made by the said Robert Furniss Long and Robert Whatkinson Long, trustees as aforesaid, according to the provisions of an act of Congress on the 24th of April, 1820, entitled "An act making further provision for the sale of public lands," for the south half of the south-east quarter, and the south half of the south-west quarter, of section 36, in township 39, of range 4, in the district of lands subject to sale at Chicago, Illinois, containing one hundred and sixty acres according to the official

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plat of the survey of said lands returned to the general land office by the Surveyor General, which said tract has been purchased by the said Robert Furniss Long and Robert Whatkinson Long, trustees as aforesaid.

"Now, know ye that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such cases made and provided, have given and granted, and by these presents do give and grant, unto the said Robert Furniss Long and Robert Whatkinson Long, trustees as aforesaid, and to their heirs, the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities, appurtenances, of whatsoever nature thereunto belonging, unto the said Robert Furniss Long and Robert Whatkinson Long, trustees as aforesaid, and to their heirs and assigns forever."

Then follow the attestation, signature, etc., on the 1st day of August, A. D. 1853. It was filed for record in the recorder's office of De Kalb county, on the 18th day of February, 1876.

The following facts were stipulated by the parties to be true, and to be received as evidence in the case.

First—The United States patent in both of said bills mentioned as a trust patent to the said Longs, was not recorded prior to the commencement of these suits in said De Kalb county.

Second—The children of Elizabeth Long and Robert F. Long, two of the complainants in said bills, at the time of the filing said bills in said causes, were aged, respectively, as follows: First, Mrs. Lucy Burton, thirty-five years, eleven months, seventeen days; second, Mrs. Eleanor Taylor, thirty-three years, one month, seventeen days; third, Alice E. Long, twenty-six years, seven months, nine days; fourth, Harry C. Long, twenty-one years, seven months, nine days; and fifth, Albert D. Long, twenty-four years, three months.

Third—George M. Hadden (defendant, now dead,) received the property mentioned in the bills of complaint in the above

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causes, by a warranty deed from said complainants Robert F. Long and Elizabeth Long, (patents were not on record,) which deed was recorded in said De Kalb county, June 15, 1855, and that said Hadden went into possession immediately, and he and his grantees have been in possession of the same and paid taxes ever since that time.

Fourth—That defendants O'Boyle, in one of said causes, and Dean, in the other, are the grantees of said Hadden, and have each been in undisturbed possession of their respective portions of said premises, and have paid the taxes thereon for more than seven years next prior to the commencement of these suits.

Fifth—The defendants then offered and read in evidence the warranty deed of Robert F. and Elizabeth Long to George M. Hadden, dated June 15, 1855, and recorded in the recorder's office of De Kalb county, Illinois, in book 14 of deeds, page 603. This deed is the old long form of warranty deed, with full covenants, conveying to Hadden the south half of the south-east quarter, and the south half of the south-west quarter, of section 36, town 39 north, range 4,—160 acres.

Sixth—Defendants next offered and read in evidence a warranty deed from George M. Hadden and wife to Erastus Dean, dated January 9, 1865, and recorded in the recorder's office of De Kalb county, Illinois, in book 32 of deeds, page 455. This deed is the old long form of warranty deed, with full covenants, conveying to Dean the south half of the south-west quarter of section 36, aforesaid,—80 acres.

Seventh—Defendants next offered in evidence the affidavit of Erastus Dean, subscribed, sworn and filed June 25, 1886, which was allowed to be read and received in evidence, by agreement of parties, the same as if sworn in open court on trial, subject to all other legal objections that might exist to it as evidence. Said affidavit is entitled in this case, and is as follows: "Erastus Dean being first duly sworn, says that since the date of his deed offered in evidence herein, and prior to

Brief for the Appellants.

the commencement of this suit, he has occupied said land therein described, in good faith, without notice of claimant's rights, and built a house worth \$700, built stables and sheds worth \$400 and over, dug a well at the cost of \$75, put in two hundred rods of hedge fence, and otherwise fenced the above tract with several hundred rods of fence."

Certain depositions were also read in evidence, on behalf of complainants, which are sufficiently noticed in the opinion. Errors were assigned, presenting the questions discussed in the opinion.

Mr. M. O. SOUTHWORTH, and Messrs. HOPKINS, ALDRICH & THATCHER, for the appellants:

Elizabeth and Robert F. Long, as to the heirs of Hadden, deceased, were incompetent witnesses. *Merrill v. Atkin*, 59 Ill. 19; *Langley v. Dodsworth*, 81 id. 86; *Branger v. Lucy*, 82 id. 91; *Ruckman v. Alwood*, 71 id. 155; *Pyle v. Oustatt*, 92 id. 209; *Wachter v. Blowney*, 104 id. 610; *Cassel v. Cassel*, id. 361.

Robert W. Long and Robert Furniss Long took no estate whatever. They being mere naked trustees, with no duties to perform, the title vested at once in Elizabeth Long and those who were then her children. Rev. Stat. chap. 24, sec. 3; Perry on Trusts, sec. 298; *Witham v. Brooner*, 63 Ill. 344; *Lynch v. Swayne*, 83 id. 336; *Kirkland v. Cox*, 94 id. 400.

A grantee has a right to suppose that his grantor has all the title that he claims to have in the deed of conveyance that he gives. *Rodgers v. Karanaugh*, 24 Ill. 583.

Where a trustee is in actual possession of the estate, (as in this case,) and for a valuable consideration conveys it to a purchaser who has no notice of the trust, such purchaser will be entitled to hold the estate against the *cestui que trust*, because their equities were equal; and the court will leave the parties in the state in which it finds them, where equities are balanced. Tiffany & Bullard on Trusts, p. 818, and authorities cited, and p. 820, on the doctrine of notice; *Dennis v. McCagg*, 32 Ill. 429.

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So we say in this case, that the children who were in being at the time of the issuing of the patent by the government, took the title to the real estate with their mother, to the exclusion of said Henry C. Long, who was not only born thereafter, but who was, as we have already shown, begotten after the title had vested.

An immediate gift to children,—*i. e.*, a gift to take effect in possession immediately on the testator's decease,—whether it be to the children of a living or a deceased person, or whether to children, simply, or to all the children, or whether there be a gift over in case of the decease of any of the children under age or not, comprehends the children living at the testator's death, and those only. 2 Jarman on Wills, (5th ed.) 156; *Handberry v. Doolittle*, 38 Ill. 206; *Jenkins v. Freyer*, 4 Paige, 46.

Messrs. MAYBORNE, FLOWER, REMY & HOLSTEIN, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

We have arrived at the same conclusion reached by the chancellor below, but by a somewhat different process of reasoning.

We are inclined to think the depositions of Robert Furniss Long and Elizabeth Long, two of the complainants, taken after the death of Hadden, were incompetent to be read in evidence as against his heirs-at-law, and they prove nothing that we deem of any moment against Dean, his grantee. But omitting those depositions, the patent establishes, beyond all question, that the only title that Robert Furniss Long had in the land was as joint trustee with Robert Whatkinson Long, for the wife of the former, Elizabeth Long, and her children. The patent recites that "Robert Furniss Long and Robert Whatkinson Long, in trust for Elizabeth Long and her children, of Cook county, Illinois, have deposited in the land office of the United States a certificate of the register of the

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land office at Chicago, whereby it appears that full payment has been made by the said Robert Furniss Long and Robert Whatkinson Long, trustees as aforesaid," for the tract of land therein described, adding: "Which said tract has been purchased by said Robert Furniss Long and Robert Whatkinson Long, trustees as aforesaid, and the land is therefore conveyed unto the said Robert Furniss Long and Robert Whatkinson Long, trustees as aforesaid." There is nothing in the record tending to contradict this recital, and it must therefore be accepted as conclusive as to the facts recited, and therefore that a trust, only, is conveyed by the patent.

The case is unlike *Witham v. Brooner*, 63 Ill. 344, *Lynch v. Swayne*, 83 id. 336, and *Kirkland v. Cox*, 94 id. 400, where it was held, that under the operation of section 3, chapter 24, of the Revised Statutes of 1845, a conveyance in trust, or to the use of any person, which requires no duties, prescribes the execution of no trust, but leaves the trustee only a passive title, carries to the *cestui que trust* lawful seizin, estate and possession. The trust here created is for a married woman and her children. At the date of its creation she was not, under the law then in force, *sui juris*, in all respects, with reference to her separate property, and some or all of her children were then minors, and therefore incapable of legally contracting in regard to their property; and in such cases it is held the statute will not vest the estate in the *cestui que trust*, but the estate will vest in the trustee for the *cestui que trust*. *Perry on Trusts*, (1st ed.) secs. 310, 311, and authorities cited in note 1, on page 290, and in note 3, on page 291.

We are unable to agree with counsel for appellees, that the language employed in this patent created a life estate in Elizabeth Long, with remainder over, after her death, to her children. There is no language creating a particular estate in Elizabeth Long, and that is indispensable to the creation of a remainder. No words are employed showing an intention to carve out a life estate. We agree with them that the words,

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"children," here, are words of purchase and not of limitation, but they are to be read conjunctively with the name of Elizabeth Long. The pleadings show that Robert Furniss Long was the husband, and that Robert Whatkinson Long was the step-son, of Elizabeth Long. The transaction was therefore in the nature of a family settlement, in which the present as well as the remote welfare of the children was as much an object of concern as the present and remote welfare of Elizabeth Long. In such cases, the rule relied upon by counsel for appellant, as laid down in *Handberry v. Doolittle*, 38 Ill. 206, does not apply. That applies only to cases where a class of persons are to come into immediate possession upon the death of the testator. Here, the object and intention is the support of a family, in which after-born children are as much the concern of the donor as those then in being; and so it is said: "Whenever the fortune of a married woman is within the jurisdiction of the court, either by having been paid into court or by a suit concerning its possession, the court always directs an inquiry whether a settlement has been made; and the constant habit is to direct a settlement, not only upon the wife, but upon the children also. The wife can not say that she claims a settlement for herself, and not for the children. She has the option to have no settlement; but if a settlement is made, it must be upon the wife and children." *Perry on Trusts*, (1st ed.) sec. 627. And this includes children unborn as well as those then in being. (1 *Bishop on the Law of Married Women*, sec. 673.) And so a grant to a wife, and her child begotten by the grantor, has been held to give a joint estate to the wife and a child subsequently born. (*Powell v. Powell*, 5 *Bush*, 619.) And so, "if there be a devise or limitation to the use of the children of A, the estate may vest in joint tenancy in one, and afterwards in other children, as they progressively are born." 4 *Kent's Com.* (8th ed.) 376, *359. A conveyance, as here, to the use of a woman and her children, plainly means to her and all of her children, the right vesting in each child,

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successively, as born. No other view is consistent with the object and purpose of such a limitation.

It is not pretended, in the view that the legal estate did not vest in the *cestuis que trust, eo instanti*, the execution of the deed, that there is any difficulty in the trustees holding for the benefit of the unborn child. Hadden was not a purchaser in good faith, without notice. The only proof in regard to his obtaining title is, that Robert Furniss Long and Elizabeth Long conveyed to him, and he immediately went into possession. The rule is thus laid down by Sugden, in his work on Vendors, (8th Am. ed.) vol. 2, page 561: "In all cases where a purchaser can not make out a title but by a deed which leads him to another fact, whether by description of the parties, recital or otherwise, he will be cognizant thereof, for it was *crassa negligentia* that he sought not after it." Hadden, here, could not make out a title but by the patent, and that being obtained would have disclosed the trust, for there is not the slightest pretense that any other title was exhibited as that under which they held. It was by reason of his own gross negligence that he did not know the contents of the patent,—if, in fact, he did not know them,—and he could, therefore, only have taken under the deed to him, subject to the trust. But his deed to Dean was clearly color of title, and on Dean's part it was obtained in good faith; and since there was the requisite proof of possession, and payment of taxes thereunder, and the lapse of more than the period of seven years between the time Dean obtained it and the bringing of suit, the bar of the Statute of Limitations is complete as to all the parties except Harry C. Long, who was only twenty-one years and some odd months old when the suit was brought, and who, consequently, is within the saving clause of the act.

We are, therefore, of opinion that neither the errors nor cross-errors are well assigned, and the decree below is affirmed.

Decree affirmed.

Syllabus.

THE CHICAGO AND EASTERN RAILROAD COMPANY

v.

ISAAC W. HOLLAND.

Filed at Ottawa September 26, 1887.

1. **EVIDENCE—physical examination of plaintiff in suit for personal injuries.** In an action against a railway company to recover for personal injuries to the plaintiff, occasioned by negligence, the defendant asked for an order of court that the plaintiff submit to an examination by certain physicians named in the motion, which was overruled. Something over a year later the defendant sent two physicians of its selection to examine as to plaintiff's physical condition, one of whom had before made a thorough examination, who was not admitted, but the other was, and made an examination. Still later, another of the physicians named in the motion was allowed to make a thorough examination of the plaintiff: *Held*, that as the defendant had the benefit of an examination by three of its physicians, it could not complain of the overruling of its motion.

2. **SAME—statements and declarations—as part of the *res gestae*.** In an action by a party injured by a collision with a railway train, against the railway company operating such train, the plaintiff will have the right to show the position of the defendant's train, and what precaution, if any, the conductor in charge of the train had taken to guard against danger; and the statements or declarations of the conductor a few moments before the collision, being a part of the *res gestae*, may be shown for that purpose.

3. **SAME—proving contents of letter on cross-examination.** On the trial of a case the defendant laid the foundation for the introduction in evidence of a letter handed to a witness, who identified the letter, and, on his direct examination, stated its contents to the jury. On cross-examination the letter itself was allowed to be given in evidence: *Held*, no error. If its contents were proper evidence for the defendant, the letter itself was also for the plaintiff.

4. **PRACTICE—specific objection—when to be made.** On the trial of an action to recover damages for a personal injury, the plaintiff proved the amount he had paid and incurred for medical treatment, which was objected to as "incompetent, immaterial and irrelevant:" *Held*, that it could not be assigned for error that the evidence should not have been admitted without proof that the physicians for whose services the expense was incurred, were entitled to practice, as that objection, if tenable, might have been obviated on the trial, if specifically made. A specific objection, which may be obviated, must be made on the trial before it can be urged on appeal.

5. **SAME—remarks of court as to evidence.** On the trial of an action for a personal injury, during the examination of a physician as to his

122	461
33a	129
122	461
140	68
140	617
41a	276
122	461
42a	46
122	461
150	397
153	167
122	461
46a	63
122	461
59a	477
122	461
165	336
122	461
69a	83
.70a	309
122	461
79a	51
122	461
178	589
122	461
187	*241
122	461
202	*183

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opinion in regard to some of the theories advanced by medical writers, the defendant's counsel read a long quotation from a medical work, and asked the opinion of the witness as to the correctness of the extract, when the court remarked: "I have a book written in Spanish, by a Mexican lawyer, and I may as well read that to him (witness) as your reading medical books to them:" *Held*, that as this was no ruling on the admission or exclusion of evidence, and it not appearing to have injured any one, the defendant could not complain.

6. **MEASURE OF DAMAGES—personal injury from negligence.** In case of personal injury from negligence, the injured party may recover such actual damages as are the natural and proximate result of his injury, such as his loss of time, his pain and suffering, his necessary and reasonable expenses in medical and surgical aid and nursing, as shown by the evidence; and if the injury is permanent and incurable, the jury, in assessing the damages, may take such fact into consideration. The fact that he has a wife living, can not, however, be considered by the jury in fixing the plaintiff's damages.

7. **INSTRUCTION—construed—as whether leading jury to give exemplary damages.** In an action for damages for an injury claimed to be the result of defendant's negligence, the court instructed the jury, at plaintiff's request, that in determining the question of negligence they should take into consideration the conduct of both parties at the time of the alleged injury, as disclosed by the evidence; and if they believed, from the evidence, that the injury complained of was caused by the negligence of the defendant's servants, as charged in the declaration, and if they further believed, from the evidence, that the plaintiff was without fault, and was exercising ordinary care and prudence in the discharge of his duties, then the plaintiff was entitled to recover such damages as the jury might believe, from all the evidence, he was entitled to receive, as a compensation for all the injuries received and suffered by him in the premises. No exemplary damages were claimed by the pleadings or evidence: *Held*, that the instruction was not subject to the objection that under it the jury might give exemplary damages.

8. **SAME—repeating propositions of law in different words.** If the jury has been properly instructed as to the law involved in a case, the judgment will not be reversed, although some of the refused instructions may contain correct statements of the law. And there will be no error in the modification of an instruction, when the substance of it, as asked, has been given in another one.

9. **SAME—numerous instructions not encouraged.** The practice of giving a great many instructions in a case involving no difficult or complicated questions of law, should not be encouraged, as they ordinarily tend to mislead rather than to enlighten the jury.

10. **NEW TRIAL—improper remarks of juror.** On the trial of an action against a railway company to recover damages for a personal injury alleged,

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to be the result of negligence, while defendant's counsel was stating the case to the jury, and what the evidence would show, one of the jurors said, "That won't help you a bit,—that will not do you any good:" *Held*, that while the remark was improper, and the juror deserved a small fine, yet the irregularity was not such as to require the reversal of a judgment in favor of the plaintiff.

11. **APPEAL**—*reviewing facts—question of excessive damages.* Whether the damages are excessive in an action on the case for personal injury from negligence, depends upon the facts, and when the judgment of the trial court is affirmed by the Appellate Court, its decision on that question is conclusive on this court.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action on the case, brought by Isaac W. Holland, against the Chicago and Eastern Illinois Railroad Company, to recover damages for a personal injury to the plaintiff, caused, as is alleged, by the negligence of the defendant's servants. The plaintiff, at the time he was injured, was in the employ of the Chicago, Rock Island and Pacific Railway Company, as a conductor in charge of a suburban passenger train running on one of the lines of that company, between the city of Chicago and South Chicago.

Several months prior to the trial, the defendant moved for a rule on the plaintiff, requiring him to submit his person to the examination of certain physicians and surgeons, which motion was denied.

A trial resulted in a verdict and judgment in favor of the plaintiff. On appeal by the company, the Appellate Court affirmed that judgment. On the further appeal of the company, the cause is brought to this court.

Mr. WILLIAM ARMSTRONG, for the appellant:

The court erred in overruling appellant's motion requiring appellee to submit to an examination of physicians as to his physical condition and health. *Parker v. Enslow*, 102 Ill.

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272; *Freeport v. Isbell*, 93 id. 381; *Schroeder v. Railroad Co.* 47 Iowa, 375; 2 Bishop on Marriage and Divorce, sec. 590, *et seq.*, and notes; *Walsh v. Sayre*, 52 How. 334; Rogers on Expert Testimony, p. 106, sec. 75; *Lloyd v. Railroad Co.* 53 Mo. 509.

The court erred in admitting incompetent testimony by the witnesses Heckler and Healy. *Railroad Co. v. Johnson*, 103 Ill. 512; *Railway Co. v. Fillmore*, 57 id. 266; *Railroad Co. v. Hunter*, 33 Ind. 347; *Luby v. Railroad Co.* 17 N. Y. 131; *Moore v. Meacham*, 10 id. 207; *Lane v. Bryant*, 9 Gray, 245.

It was error to allow evidence of the expenses paid and incurred to physicians, without proof that they were authorized to practice. *Chicago v. Honey*, 10 Bradw. 535; *City v. Henry*, 11 id. 154.

The remarks of the court as to the examination of medical experts, and as to extracts from medical works, were improper. *Rolling Mill Co. v. Monka*, 107 Ill. 340; *Insurance Co. v. Ellis*, 89 id. 516.

The jurymen John Reilly was not a competent and disinterested man, as evidenced by his remarks and conduct on the trial.

The first of appellee's instructions authorized the assessment of exemplary damages, which are not recoverable. *Bridge Association v. Loomis*, 20 Ill. 236; *Railroad Co. v. Avery*, 10 Bradw. 210; *Railroad Co. v. Payzant*, 87 Ill. 125.

The third of appellee's instructions does not correctly state the law of comparative negligence. *Railroad Co. v. Clark*, 108 Ill. 113; *Railroad Co. v. Johnson*, 103 id. 512; *Railroad Co. v. Manly*, 58 id. 300.

The court erred in modifying appellant's thirtieth instruction. As asked, it stated the law correctly. The failure of the plaintiff to exercise ordinary care will prevent a recovery. *Railroad Co. v. Hazzard*, 26 Ill. 473; *Railroad Co. v. Dewey*, id. 255; *Railroad Co. v. Simmons*, 38 id. 242; *Railroad Co. v. Gretzner*, 46 id. 76; *Railway Co. v. Sweeney*, 52 id. 325; *Rail-*

Brief for the Appellee.

Railroad Co. v. Damerell, 81 id. 450; *Railroad Co. v. Lee*, 68 id. 580; *Railroad Co. v. Johnson*, 103 id. 512; *Abend v. Railroad Co.* 111 id. 202; *Steel Co. v. Martin*, 115 id. 359.

That the damages (\$25,000) are excessive, see *Railroad Co. v. Jackson*, 55 Ill. 492; *Railroad Co. v. Fillmore*, 57 id. 265; *Railroad Co. v. Wilson*, 63 id. 167.

Messrs. G. W. & J. T. KRETZINGER, for the appellee:

No question of fact can be considered or reviewed by this court. *Railway Co. v. Peyton*, 106 Ill. 584; *Williams v. Forbes*, 114 id. 167; *Insurance Co. v. Barrel Co.* id. 99.

Ordinary care, negligence, the extent of the injury and the amount of the damages assessed, are all questions of fact. *Furnace Co. v. Abend*, 107 Ill. 144; *Railroad Co. v. Frelka*, 110 id. 498; *Pennsylvania Co. v. Conlan*, 101 id. 93; *City of Mattoon v. Fallin*, 113 id. 249.

The question of excessive damages was a question exclusively for the Appellate Court, and its decision is final. *Railroad Co. v. Frelka, supra*; *Railway Co. v. Peyton, supra*; *Beeler v. Webb*, 113 Ill. 436.

The effect and weight of evidence will not be considered in this court. *Railroad Co. v. Martin*, 111 Ill. 235; *Railroad Co. v. Bonfield*, 104 id. 224; *Beard v. Maxwell*, 113 id. 440.

No proper evidence was refused by the court below. No improper evidence was admitted on behalf of appellee, and no proper objection was made or exception taken to evidence admitted on behalf of appellee. *Tarble v. People*, 111 Ill. 123.

A general objection to the testimony of a witness will not be considered. *Myers v. People*, 26 Ill. 176; *Wilson v. King*, 83 id. 235.

Appellant asked forty-two instructions, nineteen of which were given. This court will not examine the others to see if they were properly refused. *Adams v. Smith*, 58 Ill. 418; *Elam v. Badger*, 23 id. 419; *Young v. People*, 109 id. 646.

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The error assigned as to the remarks made by one of the jurors during the opening statement of the defence, was not saved by objection or exception, and no injury is shown from such remarks. *Tarble v. People, supra*; *Nathan v. Bloomington*, 46 Ill. 347.

No error in the remarks of the trial court, because no injury could have resulted therefrom. *Skelly v. Boland*, 78 Ill. 439; *Beardsley v. People*, 89 id. 580.

The action of the court refusing an order for the appellee to submit to an examination of medical experts, out of court, and long before the trial, was not error, because—

First—The court had no power to make or enforce such an order. *Parker v. Enslow*, 102 Ill. 279; *Roberts v. Railroad Co.* 29 Hun, 155; *Lloyd v. Railroad Co.* 23 Mo. 515.

Second—The record shows that afterward appellee, without objection, submitted to an examination by medical experts selected by appellant, and their testimony was received on the trial. *Railroad Co. v. Finlayson*, 18 Am. and Eng. R. R. Cas. 68.

Even if the action of the court was erroneous, if appellant was not injured by it, it can not complain. *Skelly v. Boland*, 78 Ill. 439; *Young v. McConnell*, 110 id. 84; *Zimm v. People*, 111 id. 49.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

On the 13th day of October, 1883, appellant appeared in court, and filed a motion, in writing, asking for an order of court that appellee submit to an examination by two physicians, who are named in the motion. The court overruled the application, and the decision is assigned for error. Whether this decision was erroneous or not, is a question which it will not be necessary here to determine. On the 15th day of December, 1884, the appellant sent two physicians of its own selection to the residence of appellee, for the purpose of mak-

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ing an examination of his physical condition. One of the physicians had previously made a thorough examination, and he was not admitted. The other one, however, was admitted, and made an examination. On the 20th day of December, 1884, appellant sent Dr. H. W. Lyman, who was one of the physicians named in its motion. He was admitted, and made a thorough examination of appellee. In what manner appellant was injured by the decision overruling the motion, is not apparent. Had the motion been allowed, an examination would have been made by two physicians. The motion was denied, but an examination was, in fact, made by three physicians of appellant's own selection. Nothing was lost by the decision, as appellant was allowed an examination, which was all it asked by the motion. The fact that the examination was made at a later period than it would have been made had the court allowed the motion, so far as appears, was a matter of no moment.

It is next insisted that the court erred in the admission in evidence of the conversation of James A. Healy and James C. Heckler with the conductor of appellant's train, which occurred a moment before the collision. The evidence of Healy was as follows: "I saw this conductor and spoke to him, and the words I spoke to him were these: 'Where are you going to?' He says, 'Going over with my train to back into the Pullman 'Y,' over the Rock Island track;' and the words I said to him were: 'You hadn't ought to do any such thing; you will get caught.' I said, 'You are doing it on short time.' I told him we were side-tracked,—that we would not undertake to do it; and I asked him if he was flagging, and he said no,—he didn't think it was necessary." The witnesses testified that the conversation occurred only a moment before the collision. The plaintiff had a right to show the situation of appellant's train, and what precaution, if any, the conductor in charge of the train had taken to guard against danger, and the declarations of the conductor, made at the time they were,—on the eve of the collision,—were admissible as a part of the *res gestæ*.

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A witness was called by plaintiff to prove the amount plaintiff had incurred for medical treatment, and gave the court, both paid and unpaid aggregation, the sum of \$784.80. The plaintiff had been treated by several different physicians, and it is insisted that the evidence was incompetent, as there was no proof that these physicians, or any of them, were entitled to practice medicine under the statute. When the evidence was offered, the objection made to it was, "that it is incompetent, immaterial and irrelevant." If the law cast the burden upon the plaintiff to prove that the physicians who treated him were entitled to practice, (which, however, we do not decide,) appellant was bound to make the specific objection on the trial, in order that the plaintiff might have an opportunity to remove the objection by proper testimony. The general objection was not enough. It was the duty of appellant to point out the specific objection to the evidence, and a failure to do so will preclude the right to rely upon such specific objection on appeal.

Upon the cross-examination of Dr. Peck, a witness called by appellant, the witness identified a certain letter written by Dr. Durfee in regard to the physical condition of appellee, and the letter was admitted in evidence, and this decision is claimed to be erroneous. The foundation for the introduction of this letter was laid by the appellant on the direct examination of Dr. Peck. The witness stated, on his direct examination, that the letter was handed to him by appellant, and he then proceeded to give its contents to the jury. As a part of the cross-examination of the witness, appellee had the right to read, as evidence, the original letter, to the jury. If the contents were proper evidence for the appellant, which it can not now dispute, the letter itself was likewise competent for appellee.

During the examination of some of the physicians, by appellant, obtaining their opinions in regard to some of the theories advanced by medical authors, certain remarks were made by the court in relation to the practice of reading long quota-

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tions from medical works, and asking the opinions of witnesses thereon, in which the court said: "I have a book written in Spanish, by a Mexican lawyer, and I may as well read that to him as your reading medical books to them." It will be observed that the court made no ruling in regard to the admission or exclusion of evidence; and as to the remark made by the court, we can not see that it injured any one, and if appellant was not injured it can not complain.

When counsel for appellant was stating the appellant's case to the jury, having made a statement that evidence would be brought out which would prove certain facts, one of the jury-men said: "That won't help you a bit,—that will not do you any good." While it was improper for a juryman to make a remark of that character, and while the court might, with propriety, impose a small fine on a juryman for a disregard of duty, yet we are not aware of any authority for reversing a judgment where an irregularity of that character has intervened on the trial of a cause.

Some other complaints have been made, in the argument, in regard to the rulings on the admission of evidence, but without going over them in detail, it is sufficient to say that none of them is of a sufficient magnitude to call upon the court to reverse the judgment.

At the request of the plaintiff, the court gave to the jury three instructions, and they are all claimed to be erroneous. The first one is as follows:

"The jury are instructed, that in determining the questions of negligence in this case they should take into consideration the conduct of both parties at the time of the alleged injury, as disclosed by the evidence; and if the jury believe, from the evidence, that the injury complained of was caused by the negligence of defendant's servants, as described in the declaration, and if the jury further believe, from the evidence in this case, that the plaintiff was without fault, and was exercising ordinary care and prudence in the discharge of his duties

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as conductor of the dummy train, then the plaintiff is entitled to recover in this case such damages as the jury may believe, from all the evidence, he is entitled to receive, as a compensation for all the damages received and suffered by said plaintiff in the premises, provided the jury find, from the evidence, that the plaintiff was injured as described in the declaration."

The objection urged against this instruction, as we understand the argument, is, that the jury might, under the terms of the instruction, give exemplary damages. The instruction does not inform the jury that they can give exemplary damages. Such damages were not claimed, either by the pleadings or evidence, and we can not conceive how an intelligent jury could by this instruction be led off upon that field of investigation. The instruction contains a correct proposition of law, and if the appellant thought there was any danger that the jury might enter upon the question of exemplary damages, he ought to have requested the court to instruct the jury, in making up their verdict, to disregard all claims, or supposed claims, on account of exemplary damages.

The second instruction was as follows:

"If the jury find the issues for the plaintiff, then the plaintiff is entitled to recover such actual damages as the evidence may show he has sustained as the direct or approximate result of such injury, taking into consideration his loss of time, his pain and suffering, his necessary and reasonable expenses in medical and surgical aid, and nursing, so far as the same may appear from the evidence in this case; and if the jury find, from the evidence, that the said injury is permanent and incurable, they should also take this into consideration in assessing the plaintiff's damages; and the jury are instructed that the fact that said plaintiff is married, and that his wife is living, can not be considered by the jury in determining the amount of damages to which the plaintiff is entitled in this case."

We perceive no error in this charge to the jury. The damages are confined to the direct result of the injury. The loss

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of time, necessary expenses incurred for medical aid and nursing, are matters always proper to be considered in such cases in determining the amount of recovery. It may perhaps be true that no witness estimated the amount, in dollars and cents, which had been incurred for nursing; but there is abundance of evidence in the record that the plaintiff was nursed and watched over and cared for by day and by night, and by persons, too, not members of the family. Here was ample evidence before the jury from which they might properly consider the nursing, as well as the pain, loss of time, and necessary medical expenses in arriving at the amount the plaintiff might recover.

The third and only remaining instruction given for the plaintiff merely reiterated the rule of comparative negligence which has been approved by this court in a number of decisions.

The appellant requested the court to give to the jury forty-two instructions. The court refused twenty-three,—Nos. 4 to 26, inclusive,—and gave nineteen,—Nos. 1, 2, 3, and 27 to 42, inclusive. No. 30 was, however, modified, and given as modified. The decision of the court in modifying and refusing instructions is relied upon as error.

There were no difficult or complicated questions of law involved in this case, requiring so many instructions. Indeed, such a large volume of instructions ordinarily tends to mislead rather than enlighten a jury, and the practice of giving so many instructions ought not to be encouraged. If, therefore, the jury have been properly instructed in the law involved in the case, the judgment can not be reversed, although some of the refused instructions may contain correct statements of the law.

Instruction No. 30, which the court modified, aside from a technical objection, contained a correct proposition of law, and it might well have been given as asked. The instruction, in substance, declared that plaintiff could not recover, unless, at the time of the collision, he was exercising due care for his

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personal safety. But the same principle was announced in other instructions, so that the jury had the full benefit of the charge as asked, and nothing more could be required. In the first instruction given for the plaintiff, the principle of the modified one is fully given to the jury. It is there, in effect, declared that it is essential to a recovery that the jury must find that the injury complained of was caused by the negligence of defendant's servants, and that the plaintiff was without fault, and was exercising ordinary care and prudence in the discharge of his duties. Indeed, the claim was not made that plaintiff could recover unless he was in the exercise of ordinary care at the time of the accident.

It is also said that No. 4 should have been given; but the substance of this was given to the jury in No. 42, and no necessity existed for repeating the same thing in different language. The same may be said of other refused instructions, but it will serve no useful purpose to go over them one by one.

After a careful examination of all the instructions and the evidence in the case, we are satisfied that the jury, in and by the instructions given, were fully and fairly instructed in regard to all the law involved in the case, and this is all that could be desired or required.

Something is said in the argument in regard to the damages being excessive, but that is a question which does not arise here. The judgment of the Appellate Court is conclusive upon that question.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Syllabus.

THE ILLINOIS CENTRAL RAILROAD COMPANY

v.

THE CHICAGO, BURLINGTON AND NORTHERN RAILROAD COMPANY.

Filed at Ottawa September 26, 1887.

1. **REMOVAL OF CAUSE**—from *State to Federal court*—in proceeding under *Eminent Domain act, as between two railroad companies*. In a proceeding to condemn a right of way by a railway company over lands held by the Illinois Central Railroad Company, partly under grant of the United States and partly by condemnation, the latter company moved the court to transfer the cause to the Circuit Court of the United States, on the ground that it owed duties to the United States which it could not discharge efficiently if its right of way was taken, which motion was overruled: *Held*, that there was no error in refusing to so transfer the cause to the United States court.

2. **EMINENT DOMAIN**—condemning the right of way, along the line of one railroad, for the use of another company. The legislature of the State, subject to the conditions in the constitution, has the power, by a general law, to authorize one railway company to condemn a part of the right of way of another, longitudinally, several miles, when necessary for the construction and use of the new road; but without such legislative authority such condemnation can not be had.

3. The general grant of power given in section 17, chapter 114, of the Revised Statutes, relating to railroads, to take and condemn real estate for railroad purposes, is not intended to extend to property already applied to a public use.

4. While the legislature have provided by law for the crossing and intersection of one railroad over and across the track and right of way of another, and required the company whose road is crossed or intersected, to unite with the new railway company in forming such intersections and connections, and grant the proper facilities therefor, it has not given a new railway corporation the right to condemn the right of way of a prior company, longitudinally, for a number of miles in length, or any part thereof, to the exclusion of such prior company.

5. The power to take the right of way, or any part of the right of way, of another railway company, is expressly limited by the statute to the purposes of crossing, intersecting and uniting,—or, more shortly stated, to the “connections” of the two roads.

6. The petitioning company has no power, under section 19 of the Railway act, to take any part of the right of way of another company, except for the purpose of some connection resulting from a crossing or inter-

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section, or the uniting and joining of the two roads at some point in the line of the new road selected by the petitioning company.

7. STATUTE—*rule of construction—to give effect to every provision thereof.* A statute should be construed in such manner that all its parts will not only be consistent with each other, but that every provision thereof shall be given its proper effect, so that nothing therein shall appear to be superfluous or redundant.

APPEAL from the Circuit Court of Jo Daviess county; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. B. F. AYER, for the appellant:

The circuit court erred in denying the petition for the removal of the cause into the Federal court. *Boone County v. Patterson*, 98 U. S. 403; *Pacific Removal cases*, 115 id. 17; *Insurance Co. v. Pechner*, 95 id. 183; *Water Co. v. Keyes*, 96 id. 201; *Stone v. South Carolina*, 117 id. 430.

If some title, right, privilege or immunity on which the recovery depends, will be defeated by one construction of a law of the United States, or sustained by the opposite construction, the case will be one arising under the laws of the United States, within the meaning of the Removal act of 1875. *Starin v. New York*, 115 U. S. 257; *Railroad Co. v. Mississippi*, 102 id. 135; *Cohens v. Virginia*, 6 Wheat. 264; *Osborn v. United States Bank*, 9 id. 738; *New Orleans v. Armos*, 9 Pet. 224; *Mayor v. Cooper*, 6 Wall. 247; *Tennessee v. Davis*, 100 U. S. 257; *Ames v. Kansas*, 111 id. 449.

The act of Congress was intended to secure, and did secure, to the government the free use of appellant's road, into whose hands soever the property may lawfully come. *Railroad Co. v. United States*, 93 U. S. 442.

The grounds of the motion to dismiss are, first, that the plaintiff has no lawful authority to take property *in invitum*; second, that the property sought to be taken is not subject to condemnation under the laws of the State; and third, that the property is not necessary for the purposes sought for. These questions may be raised by the motion. *Railroad Co.*

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v. *Trustees*, 43 Ill. 303; *Railroad Co. v. Dix*, 109 id. 237; *Railway Co. v. Railroad Co.* 112 id. 587.

The property in question is not subject to condemnation, under the existing laws of this State, for the purposes named in the petition. *Railroad Co. v. Trustees*, 43 Ill. 303; *People v. Miner*, 46 id. 384; *Springfield v. Railroad Co.* 4 Cush. 63; *Railroad Co. v. Railroad Co.* 118 Mass. 391.

A railroad corporation organized under a general law has no right to lay out its road within the right of way of another company. Such authority might be granted by the legislature, but has not been granted. *Railroad Co. v. Railroad Co.* 124 Mass. 368; *Matter of Boston Railroad Co.* 53 N. Y. 574; *Railroad Co. v. Williamson*, 91 id. 552; *Matter of New York Railway Co.* 99 id. 23; *Matter of City of Buffalo*, 68 id. 167; *City of Bridgeport v. Railroad Co.* 36 Conn. 255; *Cemetery Association v. New Haven*, 43 id. 234; *Railroad Co. v. Railroad Co.* 66 Ill. 174; *Railroad Co. v. Town of Lake*, 71 id. 333; *Horse Railway Co. v. Horse Railway Co.* 81 id. 523; *Railway Co. v. Railway Co.* 87 id. 317; *Railway Co. v. Railroad Co.* 112 id. 589.

The property is not subject to condemnation, because already appropriated to another necessary public use, and because not indispensably necessary for the use of the appellee. The courts have no power to revise the action of the legislature. *Railroad Co. v. Lake*, 71 Ill. 336; *Bridge Property v. County Commissioners*, 103 Mass. 124; *Corporation v. County of Norfolk*, 6 Allen, 353; *Park Commissioners v. Armstrong*, 45 N. Y. 243; *Secombe v. Railroad Co.* 23 Wall. 108; Mills on Eminent Domain, sec. 11, and cases cited.

Mr. R. H. McCLELLAN, also for the appellant, as to the right of one railway company to condemn the right of way of another, cited *Railway Co. v. Railroad Co.* 112 Ill. 589, and *Railroad Co. v. Railroad Co.* 97 id. 507.

Mr. JOHN N. JEWETT, also for the appellant.

Brief for the Appellee.

Mr. CHARLES M. OSBORN, Mr. M. D. HATHAWAY, and Mr. SAMUEL A. LYNDE, for the appellee:

Property held by the United States, if not used for governmental purposes, may be condemned. *Kohl v. United States*, 91 U. S. 367; *United States v. Bridge Co.* 6 McLean, 517; *United States v. Chicago*, 7 How. 185; *Railroad Co. v. Railroad Co.* 66 Ill. 174; *Railroad Co. v. Railroad Co.* 97 id. 515.

Property, of whatever kind or description, held by a railroad corporation, but not used in the performance of its duties to the public, may be taken, under the powers granted by the present statutes of this State, to the same extent and under the same circumstances as property held by individuals may be taken. *Railroad Co. v. Railroad Co.* 66 Ill. 174; *Railroad Co. v. Railroad Co.* 87 id. 317; *Railroad Co. v. Railroad Co.* 75 id. 117.

Property held by a railroad company, and actually in use in the performance of its duties to the public, may be taken when it is not essential for that use, and the use to which the property is to be put by the corporation seeking to take, is superior in degree to that to which the property is already devoted. *Illinois and Michigan Canal v. Railroad Co.* 14 Ill. 314; *Railroad Co. v. Railroad Co.* 97 id. 515; 100 id. 21; *Railroad Co. v. Railroad Co.* 105 id. 408; *Railroad Co. v. Railroad Co.* 112 id. 589; *Railroad Co. v. Railroad Co.* 36 Conn. 196; *Railroad Co. v. Railroad Co.* 83 N. C. 495; *Railroad Co. v. Gaslight Co.* 63 N. Y. 326; *Railroad Co. v. Bailey*, 3 Ore. 164; *Railroad Co. v. Railroad Co.* 7 Foster, 183; *Water Power Co. v. Railroad Co.* 23 Pick. 316; *Blind Asylum case*, 43 Ill. 303; *Railroad Co. v. Railroad Co.* 118 Mass. 291; *Railroad Co. v. Railroad Co.* 124 id. 368; 53 N. Y. 574; *Prospect Park Co. v. Williamson*, 91 id. 552; 68 id. 167.

Where property is necessary for the use of two corporations, and the corporations and the uses for which the property is required are substantially of equal importance, if it is practicable for the two corporations to use it jointly, in such a man-

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ner as to accommodate the necessities of both, such joint use may be obtained by condemnation, the rule being that priority of occupation gives no exclusive right, except so far as the actual existence of the principal franchise is involved. *Railroad Co. v. Railroad Co.* 97 Ill. 515; *Railway Co. v. Railway Co.* 105 id. 117; *Town of Lake v. Railroad Co.* 71 id. 334; *Railroad Co. v. Railroad Co.* 67 id. 147; *Railroad Co. v. Railroad Co.* 96 id. 274; *Railroad Co. v. Railroad Co.* 108 id. 265.

As to the character of the necessity which will authorize the taking of property already in public use, see *Lake Shore case*, 97 Ill. 513; *Springfield v. Railroad Co.* 4 CUSH. 63.

As to question of removal to the Federal court, see *Osborn v. Bank*, 9 Wheat. 738; *McCulloch v. Maryland*, 4 id. 456; *United States v. Bridge Co.* 6 McLean, 517; *United States v. Chicago*, 7 How. 194; *Kohl v. United States*, 91 U. S. 367; *Railroad Co. v. Railroad Co.* 3 Fed. Rep. 106; *Railroad Co. v. Railway Co.* 1 McCrary, 304; *Baker v. Gee*, 1 Wall. 333; *Mills Co. v. Railroad Co.* 107 U. S. 557; *Emigrant Co. v. Adams Co.* 100 id. 61; *Dowell v. Griswold*, 5 Saw. 39; *Savings Society v. Ford*, 114 U. S. 641; *Hoadly v. San Francisco*, 94 id. 4; *Stavin v. New York*, 115 id. 248; *Tucker v. Ferguson*, 22 Wall. 527.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

By the present proceeding, the Chicago, Burlington and Northern Railroad Company seeks to condemn, for railroad purposes, certain real estate in Jo Daviess county, belonging to the Illinois Central Railroad Company, the appellant herein. That part of the land sought to be taken which gives rise to the most serious question involved in the present controversy, consists of three strips of unequal width, running longitudinally with and constituting a part of so much of appellant's right of way as lies between the rocky bluffs and the eastern bank of the Mississippi river, between Portage Curve and East Dubuque. Appellant derives title to part of this land through the act of Congress of the 20th of September, 1850, popularly

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known as the Illinois Central railroad grant. The part of the right of way thus acquired is two hundred feet wide. The remainder of it, having been acquired in pursuance of the statute, is, consequently, but one hundred feet wide. The track of appellant is laid in the center of its right of way, and the part of it proposed to be taken by appellee is all that part of the westerly half which lies eight feet or more west of the center line of the track. This would leave but about two feet between passenger cars passing each other on the two roads.

As the grant from the government to the State, just referred to, and through which appellant derives title to a part of the right of way proposed to be taken, was made upon the express condition that the appellant's road and branches "should be and remain a public highway for the use of the United States, free from toll or other charge upon the transportation of any property or troops of the United States," and that the United States mail should, at all times, be transported thereon under the direction of the post office department, and as appellant's defence to the proceeding is partly based upon the hypothesis that the whole of its right of way is indispensable to the discharge of the duties which it owes to the government under said grant, it is contended that the present suit necessarily involves a Federal question, which the appellant has the right to have passed upon and determined by the Federal courts. Acting upon this view of the law, the appellant applied to the court below for a transfer of the cause to the Circuit Court of the United States. This application having been denied, the appellant then filed therein a written motion to dismiss the petition as to each of the parcels of land in question, setting forth the grounds of the motion in numerical order, the fourth of which we think sufficiently covers the question thereby sought to be raised, and is as follows:

"4. Because the plaintiff has located its railroad longitudinally for a long distance, to-wit, the distance of ten miles and upwards, within defendant's right of way, and the several

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parcels of land described in plaintiff's petition form part of said right of way, and are already devoted to public use by respondent, and are necessary to such use, and there is no necessity that plaintiff's said railroad should be located within said right of way."

This motion having also been overruled, was renewed after the evidence was all in, and was again overruled. The jury to whom the cause was submitted, after having been formally charged in respect to the law, returned into court a verdict fixing appellant's compensation and damages at \$40,000, upon which the court rendered final judgment, and the defendant appealed.

Numerous questions are presented by the record, which have been ably and exhaustively discussed by counsel on both sides; yet in the view we have taken of the case it is not deemed necessary, nor indeed proper, to consider but two of them: First, did the court below err in refusing to transfer the cause to the United States Circuit Court? Second, did the court err in refusing to dismiss appellee's petition?

Being of opinion that the second question must be answered in the affirmative, which will necessarily lead to a reversal of the judgment, it will subserve no good purpose to enter upon a discussion of the other. Suffice it, therefore, to say, that upon the authorities cited in the briefs, and for the reasons assigned by appellee's counsel, we are of opinion the court ruled properly in denying the application to transfer the cause to the United States court.

In considering the propriety of the ruling of the court in refusing to dismiss the petition, either before or after the evidence was in, we do not deem it necessary to enter into an inquiry as to the legal *status* of appellee, for the purpose of determining whether it is such a body as might, under the constitution and laws of the State, condemn property for the construction and maintenance of its projected road. For the purposes of the conclusion reached, it may be conceded that it is.

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The only question we shall consider is, whether the property sought to be condemned is subject to be taken by appellee for the purposes specified in the petition. That the legislature of the State might, subject to the conditions imposed by the constitution, take the property for the purposes in question, we have no doubt. And we think it equally clear, that the legislature might, by a general law manifesting such intention, authorize one railroad company to condemn a part of the right of way of another, to the extent and for the uses proposed in this case; but without such legislative authority or enabling act it is manifest the taking of it would be unauthorized. This is conceded. Such being the case, the question resolves itself into this: Is there any existing legislative authority for taking property, circumstanced as this is, for the purposes and in the manner proposed? If such authority exists, it is to be found only in sections 17 and 19, of chapter 114, of the Revised Statutes. Said sections, so far as they have any special bearing upon the present inquiry, are as follows:

"Sec. 17. If any such corporation shall be unable to agree with the owner for the purchase of any real estate required for the purposes of its incorporation or the transaction of its business, or for its depots, station buildings, machine and repair shops, or for right of way, or any other lawful purpose connected with or necessary to the building, operating or running of said road, such corporation may acquire such title in the manner that may be now or hereafter provided for by any law of eminent domain.

"Sec. 19. Every corporation formed under this act shall, in addition to the powers hereinbefore conferred, have power: First, to cause such examination and survey for its proposed railway to be made as may be necessary to the selection of the most advantageous route, and for such purpose may enter upon the lands or waters of any person or corporation, but subject to responsibility for all damages which shall be occasioned thereby. * * * Fourth, to lay out its road, not

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exceeding one hundred feet in width, and to construct the same, and, for the purpose of cuttings and embankments, to take as much more land as may be necessary for the proper construction and security of the railway. * * * Fifth, *to construct its railway across, along or upon any stream of water, water-course, street, highway, plank-road, turnpike or canal, which the route of such railway shall intersect or touch.* * * * Sixth, *to cross, intersect, join and unite its railways with any other railway before constructed at any point in its route,* and upon the grounds of such other railway company, with the necessary turn-outs, sidings and switches, and other conveniences in furtherance of the objects of its connections; and every corporation whose railway is or shall be hereafter intersected by any new railway, shall unite with the corporation owning such new railway, in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations can not agree upon the amount of compensation to be made therefor, or the points and manner of such crossings or connections, the same shall be ascertained in manner prescribed by law."

The principle is well recognized that a statute should be construed in such a manner that all its parts will not only be consistent with each other, but that every provision thereof shall be given its proper effect, so that nothing in the act will appear to be superfluous or redundant. Should we, in violation of this important principle of construction, attempt to construe or give effect to section 17, above cited, without regard to the provisions of the 19th section, we might, by adhering strictly to the letter, and closing our eyes to the consequences that would result from such a construction, reach the conclusion that that section is a general grant of power to any railroad company organized under the general law, to take, under the Eminent Domain act, any real estate whatever for the purposes specified in the section, without regard to who owns it or to what uses it is applied. It will be observed that the only express qualifications or limitations upon the company's

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right to thus take, is its inability to agree with the owner for the purchase of the property, and that the property itself is required or necessary for some of the objects or purposes set forth in the section. Nevertheless, the construction here suggested, although within the literal terms of the act, is, as every one will admit, wholly inadmissible, even without reference to the provisions of the 19th section. To give it effect according to its literal terms, the entire right of way of every railroad in the State would be subject to be taken by condemnation, like any other real estate. That the legislature could have intended this, or the disastrous consequences that would necessarily result from it, is simply absurd, and consequently such a construction is wholly inadmissible. It is evident that if the legislature had intended this grant of power to take real estate for railroad purposes should extend to the right of way of existing railway companies, there would have been no occasion whatever for adopting the special provisions contained in the 19th section in respect to the crossing and uniting with other railways, and it will hardly do to say, that although the power to take the right of way for the purpose of a crossing, etc., is not given by the 17th section, yet that it is given for the purpose of a main track, or for some other specific purpose, about which not a word is said in either section.

Viewing the 17th section in the light of the provisions of the 19th, and applying the general principle of construction adverted to at the outset, we are clearly of opinion that the general grant of power therein given to take real estate for railroad purposes, was not intended to extend to property already applied to a public use. This being so, it became necessary, as we have already seen, to provide for the exceptional cases relating to crossings and the uniting with other roads. If there were other exceptional cases in the legislative mind when providing for crossings, etc., it surely was a very opportune time to name them in that connection. Having failed to do so, we are warranted in concluding, as we do, that the spe-

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cial cases provided for were all which, in the judgment of the legislature, public interest or convenience demanded.

Learned counsel for appellee, apparently conscious of the doubtfulness and insecurity of their position, so far as it is rested on the 17th section, seek to entrench themselves behind the sixth clause or division of the 19th section, which, as we have seen, authorizes any corporation organized under the act, "*to cross, intersect, join and unite* with any other railroad before constructed, and at any point in its route upon the ground of such other railroad." Counsel say: "We think that the court will give a meaning to all the words; and we submit that the word 'join' was used advisedly in this statute, to authorize and require railroad companies to join in the use of such property as might become necessary to accomplish the purposes of both railroads; and it will be observed, that by the latter clause of the paragraph the power is given to determine the amount of compensation, under the law of eminent domain, if they can not agree, so that all the powers, viz., to cross, intersect, join and unite with such other road, were intended to be compulsory, and, as we think, were intended to cover every contingency which might arise."

As we are clearly of opinion the construction here contended for is not the true one, we have given counsel the full benefit of whatever there is in it, by setting out, in their own words, all they have said about it. The terms "join" and "unite," as used above, were clearly intended to authorize merely the bringing together and the forming of a physical union or connection between the tracks of the proposed road and those of the one already built. The transitive verbs, "join," and "unite," are used conjunctively, and have for their common object the word "railways," which word they govern in the objective case. Nothing is said about joining in the use of any property, or about co-operating together for any purpose; nor is any expression used from which such an idea can be inferred, without doing violence to the language used. The grammatical sense

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and the popular sense of the language used entirely coincide. Nothing ambiguous or doubtful is perceived in it.

But conceding the construction counsel have placed upon it to be the correct one, it is not perceived how that would strengthen appellee's position, for the object of the condemnation proceeding is not to compel the appellant to "join" in the use of any property. On the contrary, it is to take from appellant, and deprive it absolutely of all right whatever in about one-half of its right of way for a distance of eleven miles or thereabouts. There is, in our opinion, no warrant or authority in the laws of this State for such an act. As the question turns upon the construction of our own statute, it would therefore be an unprofitable consumption of time to follow counsel in their elaborate discussion of the cases relating to this subject, founded upon constitutions and statutes differing from our own, and we must therefore decline to do so.

With respect to the claim that the case is one of peculiar hardship, demanding a departure from the general rule on the subject, we submit that conceding the hardship to exist, (about which it is unnecessary to express any opinion,) it is no part of the duty of courts to provide a remedy in any case, much less in one where the legislature has purposely, as it would seem here, declined to provide one. We say purposely declined, because it would be unreasonable to suppose that the legislature did not consider the question whether, under special circumstances, it might not sometimes become necessary for one railroad company to take, longitudinally, the whole or a part of the right of way of another company, to be used for its main tracks; and the fact that no provision was made for a case of that kind affords the strongest evidence that the non-action of the legislature was intentional. If the legislature had intended to confer the power claimed by appellee, how easy and natural it would have been to do so by inserting a provision for that purpose in the fifth clause of section 19. But nothing of the kind was done. There, as it has been seen,

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power is given to the condemning company "to construct its railway across, along or upon any stream of water, water-course, street, highway, plank-road, turnpike or canal," etc. Now, if after the word "canal," it had been added, "or along and upon the right of way of any other railway company, provided the part proposed to be taken is not necessary for the successful operation of the railway of such other company," it would have made the law as appellee now claims it to be; but the legislature declined to add these words or any others of similar import, and we must construe the act as it is written. The enumeration of the powers granted by the fifth and sixth clauses of the 19th section, according to a familiar rule of construction, is, by implication, a denial of all other like powers. *Expressio unius exclusio alterius.*

But in addition to this authoritative rule of construction, and what has already been said on the subject, we think the sixth clause of the 19th section bears upon its face indubitable evidence of the correctness of the construction we have placed upon the act. First, it will be observed that the crossing, intersecting and joining and uniting, therein authorized, is limited to a "point" in the route of the proposed road. The expression used would seem to be altogether inappropriate to the taking of a strip of land extending longitudinally a distance of ten or eleven miles. The phrase, "at any point in its route," used by the legislature in connection with the words, "cross, intersect, join and unite," is not only expressive of the thought that was in the legislative mind, but also of the effect which would necessarily result from either of the acts authorized to be done; for to cross or intersect or join or unite to another road, necessarily marks the "point" of such crossing, intersection or uniting of the two roads. Roads, when thus joined and united, may merge into a single road, or the two companies may arrange for a joint use of the same tracks, but in the nature of things there can be no extension of the point of intersection or union; and we emphasize the

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fact, that the power to take the right of way, or of any part of the right of way, of another company, is expressly limited to the purposes of crossing, intersecting and uniting—or, more shortly, to the "*connections*" of the two roads. This latter expression is more comprehensive than either of the other terms. Indeed, it embraces all three of the cases indicated by the terms, cross, intersect, join and unite. That the term "*connections*" is used in this sense, will hardly be questioned, and the fact that it is thus used, affords additional evidence of the correctness of the construction we have given to the statute. Thus, it will be observed the condemning company is authorized to cross, intersect, etc., "upon the grounds of such other railway company, with the necessary turn-outs, sidings * * * and other conveniences, *in furtherance of the objects of its connections.*" Further on, it is made the duty of the old company whose road is to be crossed, intersected, etc., to unite with the new company "in forming such intersections and *connections*." It is then added, that if the companies can not agree upon the amount of compensation to be made for the property, "or the *points* and manner of crossing, or such *connections*, the same shall be ascertained in manner prescribed by law." All these provisions and expressions considered, the conclusion would seem to be irresistible that the petitioning company has no power, under the provisions of the 19th section, to take any part of the right of way of another company, except for the purpose of some connection, resulting from a crossing or intersection, or the uniting and joining of the two roads, at some point on the line of the new road selected by the petitioning company.

The judgment of the court below will be reversed, and the cause remanded, with directions to that court to dismiss the petition as to the parts of the right of way of the appellant, longitudinally, sought to be condemned.

Judgment reversed.

CRAIG and SHOPE, JJ., dissenting.

Syllabus.

CHARLES D. SWORD

v.

WOLFRED N. LOW.

Filed at Ottawa November 11, 1887.

1. **FIXTURES**—whether a part of the realty, and not removable, or personal, and removable. There are three tests of the character of fixtures, as to their being irremovable, viz.: First, actual annexation to the realty, or something appurtenant thereto; second, application to the use or purpose to which that part of the realty with which they are connected is appropriated; and third, the intention of the parties making the annexation to make a permanent accession to the freehold. The latter test appears to be the principal one. In cases of doubt, the intention of the parties must control.

2. While parties may not, by contract, make personal property real or personal at will, yet when an article personal in its nature is so attached to the realty that it can be removed without material injury to it or to the realty, the intention with which it is attached will govern; and if there is an express agreement that it shall remain personal property, or if, from the attendant circumstances, it is evident or may be presumed that such was the intention of the parties, such article will be held to have retained its personal character, even as against subsequent purchasers or incumbrancers.

3. The rule that the intention with which the annexation is made will control as to the character of the fixture, does not apply to such articles as enter into and form parts of a structure appurtenant to land, such as lumber, stone and shingles, or to doors, windows and grates, and the like articles which are incorporated into the structure. These and the like articles lose their identity and become a necessary part of the structure, and are clearly distinguishable from such articles as are or may be merely annexed to the freehold and retain their characteristics, and may be removed in their entirety without material injury.

4. While it may be conceded that portable mills, engines, boilers and the like, even slightly affixed to the realty, will, in the absence of circumstances raising a contrary presumption, or evidence showing a contrary intention, be presumed to have been attached as permanent accessions to the soil, yet however permanently attached, if removable without material injury, the intention to be inferred from the circumstances, and the relation of the parties to each other and to the realty, or as shown by evidence, will be of controlling and decisive importance.

5. Where it is agreed, on the sale of a steam boiler and engine, that the vendor is to have a lien thereon, by chattel mortgage, until the price is paid,

122	487
138	502
38a	502
122	487
143	379
40a	100
122	487
148	172
122	487
153	512
122	487
164	424
65a	157
122	487
70a	565
122	487
86a	639
122	487
196a	1174
122	487
198	1 36
198	4 36

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and the purchaser gives a mortgage on the same for the price, and afterward, after setting up the same on a lot purchased by him, he renews the chattel mortgage, in which he treats the property as chattels, it will not become part of the realty if it may be removed without material injury to the freehold.

6. The purchaser of a boiler and engine agreed to and did give the vendor a chattel mortgage thereon, on April 4, 1881, maturing July 7, 1881. On May 14, 1881, the former bought a lot, and set the engine and boiler on the same for use. On July 7, 1881, a new chattel mortgage on the same property, and note, were given, falling due January 7, 1882. The purchaser being indebted to a third person, conveyed to him the lot on which the engine and boiler were set and in use, who sought to enjoin the taking of the property under the chattel mortgage. The proof failed to show that the removal of the boiler and engine would materially damage the same, or the realty: *Held*, that the boiler and engine remained personal property, and were subject to be taken under the chattel mortgage, as against the purchaser of the realty.

7. *CHATTEL MORTGAGE—notice of the rights of parties, and what rights.* Under the laws of this State, chattel mortgages are required to be filed and recorded in the recorder's office of the county; and they, from the date of their filing for record, are notice to all subsequent purchasers and incumbrancers, of the rights of the mortgagor thereunder in the property mortgaged, although it may be annexed or attached to real estate.

8. *NOTICE to purchaser—as to the character of a fixture to real estate.* *Quare*, whether the character of a fixture or chattel annexed to real estate, as fixed by the express agreement of the parties, will be changed in favor of a subsequent purchaser or incumbrancer of the realty, in case he has no notice of such agreement.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. H. M. SHEPARD, Judge, presiding.

In December, 1880, Thomas L. Kempster purchased of William W. Marsh, of Sycamore, Illinois, an engine and boiler, at the price of \$800, \$200 of which was to be paid on delivery, and for the balance he gave two notes, of \$300 each, each to be secured by mortgage on real or personal property. Wolford N. Low, appellee, was acting as agent of Marsh, in Chicago, and about January 1, 1881, Marsh shipped the engine and boiler to Chicago, consigned to Low, with instructions to de-

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liver to Kempster upon his paying the \$200 cash, and giving said notes, properly secured, for the balance, and not without. Shortly after, Kempster gave and secured the two notes by chattel mortgage, and delivered the same to Low, but was unable to make the cash payment. Kempster, afterwards, without having made the payment, got possession of the property without Low's consent. After getting possession, Kempster placed the engine and boiler in the warehouse, and borrowed money on the warehouse receipt. Low, finding that Kempster had got possession, finally consented to take chattel mortgage upon the engine and boiler for the whole \$800, and accordingly a chattel mortgage was duly executed, and recorded April 4, 1881, and maturing, with days of grace, July 7, 1881. Kempster originally bought the engine and boiler, as he represented, for the purpose of using it in a brick-yard, on leased land, but on May 14, 1881, he contracted to purchase of Willis G. Jackson, block 14, Jackson's subdivision of part of section 11, township 40, range 13. No money was paid under this contract, but Kempster entered into possession under contract for the purchase of it, and \$550 of the purchase money was agreed to be paid by a day named, and, upon payment, deed was to be delivered by said Jackson to said Kempster therefor. September 8, 1881, Kempster, being indebted to T. L. and C. D. Sword, executed a mortgage upon the premises contracted for with Jackson, to secure the same, which was recorded the same day. Said indebtedness was for machinery sold by said Sword to said Kempster some time before the execution of said mortgage. Some time after the contract of purchase made with Jackson, Kempster moved the boiler and engine upon the premises purchased, and commenced their use in furnishing the motive power in running a brick machine.

On the 7th of July, 1881, Low, as agent of Marsh, was about to take possession under a chattel mortgage, and was induced by Kempster to extend the time of payment and to take a new chattel mortgage, which was done, the new note and chattel

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mortgage bearing date and record July 7, 1881, and maturing January 7, 1882. December 5, 1881, the whole of the purchase money of the land being past due, Jackson recovered judgment against Kempster in forcible detainer, but, by agreement, there was stay of writ of possession until January 7, following,—the same day the chattel mortgage to Marsh became due. Low, learning of the forcible detainer proceedings by Jackson, called upon Jackson in regard to his lien under the chattel mortgage. Jackson made no claim to the property mortgaged, recognized it as being subject to the lien of the mortgage, and requested Low to leave the engine and boiler in Kempster's possession as long as he safely could, as he was desirous that Kempster should succeed in making brick, etc., and pay his debts. Low assented to this proposition. Marsh, being dissatisfied with Low's management of the matter with Kempster, required Low to take the paper of Kempster, and Low did so.

Kempster being unable to pay Jackson, appellant, Charles D. Sword, who had become assignee of P. L. and C. D. Sword's claim against Kempster, arranged with Kempster to advance to Jackson the \$550 due him, which he did, and Kempster and wife made a general warranty deed to appellant for said block 14. Before the purchase by Sword, and before he had paid anything upon the contract, he had actual notice of Low's chattel mortgage, and of the request of Jackson, under which the boiler and engine had been left upon the premises, and recognized the claim of Low by endeavoring to have him forego his lien and right to take possession of the property under his mortgage, and wait upon Kempster in common with other creditors, and failing in this, he attempted to induce other creditors of Kempster to buy in Low's mortgage and extend the time to Kempster, and thus prevent its foreclosure. Failing in this also, he, several days afterwards, took the deed from Kempster and wife, and paid the purchase money to Jackson.

It appears that the indebtedness to P. L. and C. D. Sword was for a brick machine purchased by Kempster, and that,

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on the 8th of September, 1881, had long been due. Neither Sword nor Kempster having paid the note to Low, on the 9th of January, 1882, he was about to take possession of the engine and boiler under his chattel mortgage. This bill was for injunction to restrain Low from foreclosing his chattel mortgage, and alleging he was about to do so, and that said property was permanently attached to the realty, and had passed to appellant under his deed of the land, etc. The Superior Court, on hearing, dissolved the injunction and dismissed the bill, and, upon suggestion, awarded damages. The correctness of the ruling of the court in these several respects is questioned by this appeal.

Messrs. G. W. & J. T. KRETZINGER, for the appellant:

The annexation of the boiler and engine, in the manner and by the means appearing in the record, made them a part of the realty, and they passed as such under the real estate mortgage executed to Sword & Son, by Kempster, September 8, 1881, as well as by the warranty deed executed by Kempster and wife to appellant, about January 1, 1882. *Dobschuetz v. Holliday*, 82 Ill. 371; *Thielman v. Carr*, 75 id. 385; *Stettauer v. Hamlin*, 97 id. 312; *Ford v. Cobb*, 20 N. Y. 351; *Snedeker v. Warring*, 12 id. 174; *Green v. Phillips*, 26 Gratt. 752; *Voorhees v. McGinnis*, 48 N. Y. 282; *Stockwell v. Campbell*, 39 Conn. 362; *Quinby v. M., C. and P. Co.* 24 N. J. Eq. 260; *Brennan v. Whittaker*, 15 Ohio St. 446; *Fortman v. Goepper*, 14 id. 565; *Franklin v. Moultsland*, 5 Wis. 1; *Sands v. Pfeiffer*, 10 Cal. 258; *McKim v. Mason*, 3 Md. Ch. 186.

The chattel mortgage made to Marsh constituted no notice to the real estate mortgagee or grantee in the warranty deed, taken as security for further advances made to save his security. *Bringhoff v. Munzenmaier*, 20 Iowa, 519; *Hunt v. Bay S. I. Co.* 97 Mass. 283; *Brennan v. Wittaker*, 15 Ohio St. 446.

The first chattel mortgage was made before the boiler and engine were attached to the real estate. If such annexation

Brief for the Appellee.

thereafter, by Kempster, was a fraud upon the rights of appellee or his assignor, the remedy is against Kempster. The lien of the chattel mortgage ceased the moment the personal property therein described,—to-wit, the engine and boiler,—became a part of the realty by annexation. *Ford v. Cobb*, 20 N. Y. 351; *Voorhees v. McGinnis*, 48 id. 282.

This controversy is not between Kempster, the chattel mortgagor, and the chattel mortgagee; therefore no estoppel, as against Kempster, that might arise upon recitals in the chattel mortgage, can be urged against appellant, the real estate mortgagee, and grantee. The recital in the chattel mortgage, describing the property as personal, ceases to be binding, and is ineffectual to create an estoppel when such property is annexed to the freehold and becomes a part of the realty. *Jenney v. Jackson*, 6 Bradw. 32; *Voorhees v. McGinnis*, 48 N. Y. 282, and cases cited in opinion of the court.

The damages found by the master, and confirmed by the court, upon the suggestion of damages by reason of the suing out of the injunction and its continuance for nine months, are not supported by the evidence. Upon the whole case made by the pleadings and evidence, it is clear that the equities were with the appellant, and that he was entitled to the remedy sought by his bill. The motion for a dissolution, and the final hearing of the cause, proceeded together upon the affidavits; therefore the services of counsel, rendered in one, were inseparable from the other. In fact, it was not the hearing of the motion to dissolve, but it was the trial of the cause upon final hearing, which resulted in the dissolution of the injunction. *Blair v. Reading*, 99 Ill. 615; *Phelps v. Foster*, 18 id. 311.

Mr. EDWARD ROBY, for the appellee:

Jackson's judgment in forcible detainer established the fact that the contract of sale of the lot, and all rights of Kempster and those claiming through him, had been extinguished. *Moore v. Smith*, 24 Ill. 512.

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But Kempster and Marsh had a right to take off their trade fixtures, which were chattels, including the engine and boiler. *Globe Marble Mills v. Quinn*, 76 N. Y. 23; *Robertson v. Corsett*, 39 Mich. 783; Herrman on Chattel Mortgages, 2, 6, 346, 347; *Henly v. Dinkerhoff*, 57 Cal. 3; *Tifft v. Horton*, 53 N. Y. 377; *Estate of Hinds*, 5 Whart. 138.

If a party had notice of the title of his grantor, he takes no greater or other estate, either legally or equitably, than was held by the grantor. *Taylor v. Baker*, 5 Price, 306; *Crafton v. Ormsby*, 2 S. & L. 583; *Daniels v. Davison*, 16 Ves. 248; 17 id. 433; *Chesterman v. Gardner*, 5 Johns. Ch. 29; *Allen v. Anthony*, 1 Meriv. 282; *Powell v. Dillon*, 2 Ball & Beatty, 416; *Eyre v. Dolphin*, id. 290; *Hall v. Smith*, 14 Ves. 426.

Either law or equity will hold an engine and boiler, under such circumstances as these, as chattels. *Moore v. Smith*, 24 Ill. 512; *Globe Marble Mills v. Quinn*, 76 N. Y. 23; *Robertson v. Corsett*, 39 Mich. 783; *Henly v. Dinkerhoff*, 57 Cal. 3; *Tifft v. Horton*, 53 N. Y. 377; *Estate of Hinds*, 5 Whart. 138; Herrman on Chattel Mortgages, 2, 6, 346, 347.

Equity will not permit Sword, by collusion with Kempster, to keep Low's boiler and engine without paying for them. *Fuller v. Paige*, 26 Ill. 358; *Badger v. Batavia Co.* 70 Ill. 302.

Any mortgage was good, between the parties, whether the mortgagee took possession or not. (*Badger v. Batavia Co.* 70 Ill. 302.) And this case shows that a chattel mortgage of a fixture is as good as any other.

Under the circumstances of this case, the engine must be regarded as personal property, if necessary to protect the paramount rights of the mortgagee. *Ford v. Cobb*, 20 N. Y. 351; *Smith v. Benson*, 1 Hill, 176; *Mott v. Palmer*, 1 Comst. 564; *Goddard v. Gould*, 14 Barb. 662.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

The principal question presented in this record is, whether the boiler and engine in controversy, under the circumstances

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of the case, passed by the deed of Kempster and wife to Sword, or were subject to the lien of the chattel mortgage in favor of Marsh. At the time of the execution of the chattel mortgage of April 4, 1881, this property was in nowise connected with the realty, but about May 14, when Kempster purchased lot 14 of Jackson, it was placed thereon. There is a sharp conflict in the evidence as to the character of the attachment of this machinery at the time of making the chattel mortgage of July 7, 1881. The evidence introduced by appellee shows that the boiler and engine, at that time, were resting upon temporary supports, simply, and covered by a shed open at both ends, out of which they could have been removed without injury to the machinery or to the freehold, while that offered by the appellant shows that they were attached to the soil by being placed upon solid brick foundations, and were inclosed by a building, so that their removal would occasion more or less damage to the articles themselves, and to the freehold. If it should become material, we are inclined to hold that the weight of evidence, when considered in the light of all the surrounding circumstances, sustains the contention of appellee as to the mode of attachment July 7, 1881, while there can be no doubt that afterwards, and before the appellant acquired his deed from Kempster and wife, in January, 1882, they were attached by being placed on brick foundations, as contended for by appellant.

We are referred to very respectable authority, holding that although the articles were personalty at the time of making the chattel mortgage, if they afterwards became attached to the realty as fixtures, they would thereafter pass with the land under a deed or mortgage thereof, and that the chattel mortgagee must seek his remedy against those who wrongfully converted the mortgaged articles, and thereby deprived him of his security. We do not question the correctness of the rule announced in cases where it properly arises, but we think that the principle contended for can have no application here. • In

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determining the questions involved, it will be necessary to consider the character of the property mortgaged, its relation to the real estate, and the relation of the respective parties to each other and to the property.

It is definitely shown, that upon the purchase of the boiler and engine from Marsh, Kempster was to pay \$200 in cash, and secure the residue by mortgage on real estate, and by chattel mortgage upon the property purchased. Kempster, being unable to pay, executed his notes for \$800,—the whole amount of the purchase price,—and a chattel mortgage to secure the same, on the boiler and engine, but was unable to give other security of any value, as he had agreed to do. On the 4th of April, 1881, this first note became due, and the time of payment was extended, new notes being taken, falling due July 4, 1881, which were secured by a chattel mortgage on this property, duly made and recorded. On the 7th day of July, 1881, the notes of April 4, 1881, having become due by their terms, Low, as agent of Marsh, took possession of the boiler and engine under the chattel mortgage of April 4, and there was then, at the request of Kempster, a farther extension of time of payment agreed upon until January 7, 1882, and a new chattel mortgage, upon the engine and boiler, made, acknowledged and recorded the same day, to secure the note given for the original purchase money of the engine and boiler. The agreement and understanding at all times, after it was found Kempster could not pay, between Kempster and those who acted for Marsh, was, that the purchase price of the engine and boiler should be secured by a chattel mortgage thereon. It is shown, at the time of the purchase Kempster represented that he expected to use this engine and boiler as motive power, etc., upon land which he had leased, but afterwards, when he entered into contract of purchase for block 14, in Jackson's subdivision, etc., of Jackson, and went into possession, he placed the property in controversy thereon, and put it in use to furnish motive power in running a brick machine. At the

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time of making the chattel mortgage of July 7, the boiler and engine were subject to the lien of the chattel mortgage of April 4, unless, as between Kempster and Marsh, the placing of it on the real estate, as described, had changed its character from that of personal property. The mortgage of April 4 was in the usual form, and contained the usual covenants. Kempster mortgaged the goods and chattels therein mentioned, etc., and Marsh or his assigns, upon failure to pay the notes thereby secured, was given the right to seize the same wherever found, and sell, to satisfy the indebtedness thereby secured.

To determine the irremovable character of a fixture, three tests are, by the modern authorities, applied, viz: "First, actual annexation to the realty, or something appurtenant thereto; second, application to the use or purpose to which that part of the realty with which it is connected is appropriated; and third, the intention of the parties making the annexation to make a permanent accession to the freehold." Herrman on Chattel Mortgages, 6; Ewell on Fixtures, 21, 22; Tyler on Fixtures, 114; Washburn on Real Prop. 16.

Mr. Ewell (page 22,) says, that "of these three tests the clear tendency of modern authority seems to give prominence to the question of intention to make the article a permanent accession to the freehold, and the others seem to derive their chief value as evidence of such intention."

Washburn (page 8,) lays down the rule: "It may be stated, in the first place, that whether a thing which may be a fixture becomes a part of the realty by annexing it, depends, as a general proposition, upon the intention with which it was done."

In *Kelly v. Austin*, 46 Ill. 156, this court said, while the intention alone will not always determine whether such structures as were there being considered, are or are not to be regarded as realty, it will have a controlling influence in cases of doubt. See, also, *Dooley v. Crist*, 25 Ill. 551; *Smith v. Moore*, 26 id. 392; *Arnold v. Crowder*, 81 id. 56; *Thielman v. Carr et al.* 75 id. 385.

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There seems to be great unanimity in the authorities, that things personal in their nature may retain their character of personality by the express agreement of the parties, although attached to the realty in such manner as that, without such agreement, they would lose that character, provided they are so attached that they may be removed without material injury to the article itself, or to the freehold. It is not held that parties may, by contract, make personal property real or personal at will, but that where an article personal in its nature is so attached to the realty that it can be removed without material injury to it or to the realty, the intention with which it is attached will govern; and if there is an express agreement that it shall remain personal property, or if, from the circumstances attending, it is evident or may be presumed that such was the intention of the parties, it will be held to have retained its personal character. *Ford v. Cobb*, 20 N. Y. 344; *Eaves v. Estes*, 10 Kan. 314; *Coleman v. Lewis*, 27 Pa. 391; *Hunt v. Bay State Iron Co.* 97 Mass. 279; *Richardson v. Copeland*, 6 Gray, 536; *Haven v. Emory*, 33 N. H. 66.

So in *Smith v. Benson*, 1 Hill, 176, COWEN, J., says: "Prima facie, such buildings would be a fixture, and would not be removable; * * * but the parties concerned may control the legal effect of any transaction between them, by an express agreement." See, also, *Shuart v. Taylor*, 7 How. Pr. 251; *Parker v. Redfield*, 10 Conn. 490; *Curtis v. Hoyt*, 19 id. 154; *Tibbetts v. Moore*, 23 Cal. 208.

In *Piper v. Martin*, 8 Pa. 206, it was held, where the sheriff had levied on two stills erected in the usual way in the distillery of the defendant, that the agreement of the defendant in the execution, that they should be treated as personality, was conclusive, and the court say: "Now whether, in contemplation of law, it was attached to the realty, or not, as a fixture, is immaterial, as the parties agreed to consider it personal property. This dispenses with the necessity of determining whether it was real or personal."

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In the case of *Ford v. Cobb, supra*, salt kettles were bought by the owner of the fee, and mortgaged to the seller as personalty to secure the purchase money, and were afterwards affixed to the freehold by being set in brick foundations, from which they could be removed only at an expense of fifty dollars. It was held that such salt pans retained their character as personal chattels, as against the subsequent purchaser of the realty, who had no notice of the chattel mortgage other than that constructively given by the filing of the chattel mortgage for record.

Eaves v. Estes, supra, arose between the vendee of the freehold and a chattel mortgagee, the purchaser of the freehold having no notice of the chattel mortgagee's lien. The property mortgaged was an engine put into and used as motive power in a mill. The court say: "But when we consider the purpose of the parties, as evinced by the mortgage, to make the engine retain the character of a chattel, regardless of its attachment to the mill, and as the mortgage violated no principle of law, wrought no injury to the rights of others, and was in the interest of trade, we have no doubt that the engine continued to be personal property." See, also, *Voorhees v. McGinnis*, 46 Barb. 242.

In *Tift v. Horton*, 53 N. Y. 377, the New York Court of Appeals held that neither a prior nor subsequent mortgagee of land can claim, as subject to the lien of his mortgage, chattels brought upon and affixed to the lands under an agreement between the owner of the fee and the owner of the chattels, that the character of the latter as a personal chattel is not to be changed. FOLGER, J., in delivering the opinion of the court, said: "While there can be no doubt that the intention of the owner of the land was that the engine and boilers should ultimately become part of the realty, and be permanently affixed to it, this was subordinate to the prior intention expressed by the agreement. That fully shows her intention, and the intention of the plaintiff, that the act of annexing them to the

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freehold should not change or take away the character of them as chattels until the price of them had been fully paid. And as parties may, by their agreement expressing their intention so to do, preserve and continue the chattels as personal property, there can be no doubt but that, as between themselves, the agreement in this case was fully sufficient to that end." See, also, *Sheldon v. Edwards*, 35 N. Y. 279; *Shell v. Haywood*, 16 Pa. 523.

In *Godard v. Gould*, 14 Barb. 662, it appeared that machinery was to be manufactured and set up in the mill of the owner of the freehold. By special agreement the machinery was to remain the property of the manufacturer until it was paid for. It was so put into the mill that it could be removed without material injury, although the attachment was such that without such agreement it would become a part of the realty. It was held that by the annexation it did not become a part of the realty, so as to pass by a deed of the mill and lot, but that it continued to be the personal property of the party who manufactured it, so long as the purchase money remained unpaid. The court say, upon the facts, "that the machinery did not, by the annexation, become part of the realty, but continued to be personal property, and belonged to the plaintiffs. * * * The deed of Stoddard and wife (the owners of the freehold) to the defendants did not affect the right of the plaintiff to the machinery. The machinery being personal property, the grantors could not convey a greater interest in it than they had. * * * Nor does the fact that the defendants are *bona fide* grantees in the conveyance make any difference. The plaintiffs in no way consented to the conveyance; they have not practiced any fraud on the defendants; their equities are at least equal to those of the defendants."

The rule as to trade fixtures between landlord and tenant, arising from the presumption that their annexation was accessory to the trade or calling of the tenant, and not to the land, is another illustration of the rule that the intention with which

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the annexation is made will control as to whether the article attached has become a permanent fixture or not. This rule, manifestly, would not apply to such articles as enter into and form parts of a structure appurtenant to land, such as lumber, stone and shingles, or to doors, windows and grates, and the like articles which are incorporated into the structure, for their removal would, *pro tanto* at least, be a destruction of the appurtenance. All these, and like articles thus used, lose their identity and become a necessary part of the building, fence, or other structure, and are clearly distinguishable from such articles as are or may be merely annexed to the freehold, or some appurtenant thereto, and which, retaining their individual characteristics, may be removed in their entirety, and without material injury. Such articles, although placed upon or even attached to the land, may or may not be fixtures, depending upon the mode of attachment and the intention of the parties. Such articles, as in the case of portable mills, engines, boilers, and the like, must, in the nature of things, be more or less firmly affixed to the soil, or some appurtenant thereto, before they can be put to the use for which they are designed. It may be conceded that such articles, even slightly affixed to the realty, will, in the absence of circumstances raising a contrary presumption, or evidence showing a contrary intention, be presumed to have been attached as permanent accessions to the soil; yet it is apparent, from the authorities, that however permanently attached, if removable without material injury, the intention, to be inferred from the circumstances, and the relation of the parties to each other and to the realty, or as shown by evidence, will be of controlling and decisive importance.

Testing this case by this rule, it is evident that the engine and boiler, on the 7th of July, when the last chattel mortgage was given, as between Kempster and his vendor, Marsh, was personal property, and liable to be taken under the chattel mortgage of April 4, and sold to satisfy the indebtedness thereby.

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secured. By the execution and delivery of the last chattel mortgage, Kempster was carrying out his original agreement to secure the purchase money by a chattel mortgage on the thing purchased by him of Marsh, until it was paid. But, independent of this, by his chattel mortgage of July 7, Kempster sold, conveyed and confirmed the property as goods and chattels. He therein described the property as "all and singular of the following described goods and chattels, to-wit., one engine and boiler, (described in detail,) located and used by said Kempster upon his brick-yard, in the township of Jefferson, Cook county, Illinois, and more particularly described as block 14, in Jackson's subdivision of the south-east quarter of section 11, and south-west quarter of section 12, township 40, range 12," etc., and covenanted that in case of default in the payment of the notes therein mentioned and secured, Marsh, his heirs or assigns, might take possession of the mortgaged property, and every part thereof, remove and sell the same to satisfy such indebtedness. It is also shown that the extension of time of payment was made at Kempster's request, and he being wholly insolvent, was made upon the express condition and agreement that he would secure the debt by chattel mortgage on this property. He would be estopped from asserting contrary to the expressed covenants of his deed, and any change Kempster may have made in the attachment of this machinery to the soil, if any, was, as to him, made in strict subordination to the lien of this chattel mortgage.

In respect to the character of evidence required to show that the chattel shall retain its character of personal property after its annexation to the freehold, the adjudged cases are at variance. In some of them, of high authority, it is held that the execution and record of a chattel mortgage will, of itself, without any special agreement that the chattel shall retain its personal character, be sufficient to prevent the article from attaching as a permanent fixture. (*Ford v. Cobb, supra; Eaves v. Estes, supra.*) In this case, as we have seen, it was ex-

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pressly agreed that Marsh was to have a lien on the property, by chattel mortgage, to secure the purchase price until paid, which brings the case within the rule as announced by the great weight of authority. We think that where the mortgagor and mortgagee agree that the property shall be treated as personalty, and the mortgagor covenants that it shall be subject to seizure and sale as a chattel upon the maturity and non-payment of the debt, and where the character of the article and mode of attachment are such that it may be removed without material injury to the freehold, the article retains its character as a chattel and does not become a part of the realty. The character of attachment, here, conceding to the fullest extent that shown by the appellant's testimony, was such as might have been made with an intention to make the articles permanent accessions to the land, or such, only, as a prudent man might, and probably would, make, to preserve and keep the machinery in place for a less time, even, than Kempster had the right of enjoyment under the terms of the chattel mortgage. Upon the most careful consideration of the evidence it will not be found that the removal of the engine and boiler would materially damage them or the realty.

Under the laws of this State, unlike that of many of the other States, chattel mortgages are required to be filed and recorded in the office of the recorder of deeds of the county, and from the date of their filing for record are notice to all subsequent purchasers and incumbrancers, of the rights of the mortgagee thereunder in the property mortgaged. (*Craig v. Dimock*, 47 Ill. 319.) In *Snowden v. Craig*, 26 Iowa, 162, chattels subject to a recorded chattel mortgage were placed upon real estate, upon which mechanics acquired a lien under the Mechanics' Lien law, without notice of the chattel mortgage lien, except the constructive notice by the record. And it was held "the notice imparted by the due and proper record of such an instrument, though called a constructive notice, is just as effectual for the protection of the rights of the parties

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as an actual notice by the word of mouth, or otherwise. Any other construction of our registry laws would effectually nullify them."

On the 8th day of September, 1881, when the right of P. L. and C. D. Sword, under whom appellant claims, accrued by virtue of the mortgage upon the land upon which these mortgaged chattels were situated, it is apparent the boiler and engine in controversy had not become a part of the realty, but, by virtue of the agreement and chattel mortgage mentioned, had retained their character as chattels. It is shown, also, that appellant was familiar with the premises in question before taking said real estate mortgage, and knew that they were in use upon the land, as described in the chattel mortgage. The courts are not harmonious in their holdings in respect to whether the rule that the parties may retain the personal character of chattels annexed to the realty by express agreement, would obtain as against a subsequent grantee or incumbrancer of the freehold to which the chattels are affixed, without notice of such agreement of the parties. Without further examination of the authorities, it will be seen from what has already been said, that many cases, and as said by Mr. Tyler, (in his work on Fixtures, page 673,) the majority of the cases, perhaps, do not regard the want of such notice as controlling in cases of this sort. The later authorities have relaxed the rule of law, and have done so in consideration of the public convenience, and in the interest of trade and commerce. And while it may be objected that under this ruling the examination of title to realty will necessarily involve the examination of the chattel mortgage record, to determine whether articles apparently attached to the soil as permanent fixtures are subject to liens as personality, we can see no hardship in holding that as to articles which necessarily retain their individual characteristics after being annexed to the soil, and which may or may not be fixtures, and which it is apparent may be removed without material injury to the freehold, the purchaser

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or incumbrancer of the realty will be required to take notice of what is apparent upon the public record. It will not be questioned that he would be required to take notice of judgment liens, although not apparent upon the land record. So, also, of tax liens, although the same are not apparent upon the land record nor kept in the office of the recorder of deeds. Here, the character of the property was such, that before it could be put to use it must necessarily be placed upon and so attached to the land as that it might, and would, if so intended, become a fixture. The parties had done everything in their power, by a compliance with the statutes of the State, to preserve this lien. If the lien may not thus be preserved, no one could buy, on time, property which may become a fixture, and secure the purchase money by a chattel mortgage thereon, for so soon as it is put into use the lien of the mortgage would be extinguished.

We are of opinion in this case, that the chattel character of the property was preserved, and that by virtue of the real estate mortgage of September 8, 1881, no lien was created upon the engine and boiler in question, as against the chattel mortgage thereon. Further characterizing this property, it is shown that as between Jackson, the owner of the fee, and Kempster and Marsh, the boiler and engine in question were treated and regarded as personal property. It appears that on December 5, 1881, the purchase money, under the contract for the sale of the land by Kempster from Jackson, being due and unpaid, Jackson brought forcible detainer against Kempster to recover possession of the land, and on the 17th of that month recovered judgment therein. Low, agent of Marsh, learning of the institution of the suit, was about to foreclose the chattel mortgage. Jackson at once disclaimed any right to or interest in the boiler and engine, recognized the lien of the chattel mortgage, and requested Low to permit the boiler and engine to remain upon the premises, in possession of Kempster, as long as he could without prejudice to his chattel mortgage lien, to which Low

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assented, upon the express agreement of Jackson that there should be no opposition to his entering, at any time, and foreclosing the chattel mortgage. This arrangement was made at Kempster's request, and by an arrangement between him and Jackson the writ of possession in forcible detainer was stayed until the 7th day of January, 1882, the day of the maturity of the chattel mortgage. It appears, affirmatively, and by a clear preponderance of evidence, that several days before appellant paid Jackson the consideration for the land, and caused the deed to be made from Jackson to Kempster, and from Kempster and wife to himself, he was fully apprised of all the facts and circumstances connected with the sale of the chattels to Kempster, the taking of the various chattel mortgages thereon, and of the agreement and understanding between Kempster and Marsh in respect to the chattel mortgage lien on said property to secure the purchase money. At the time, therefore, of the making of the real estate mortgage in September, 1881, and at the time of Jackson's conveyance to Kempster, and by Kempster and wife to Sword, the grantees in said mortgage and deed were chargeable with notice of the chattel mortgage of Marsh, and the purpose and intention of the parties in respect of this property, as disclosed thereby. Appellant, under neither of his claims, has superior equity, or stands in any better or different position, in respect to the chattels in controversy, than his grantors stood, and is entitled to no different relief, in equity, than Kempster would have been had he filed this bill after acquiring the title from Jackson. The decree of the Superior Court dissolving the injunction, dismissing the bill, and for costs, was properly rendered.

It is also urged that the court erred in awarding damages upon suggestions filed at the dissolution of the injunction. It is not, as we understand counsel, contended that the items in respect of which the damages were assessed are not proper elements of damage, but that the amount found and allowed is excessive. We have carefully considered the evidence contained

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in the master's report, and find that the amount, both as to the item for solicitor's fees and for damage to the property, is sustained by the proof, and we are unable, in the face of the evidence, to say they are excessive.

Finding no error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

SHELDON, Ch. J., and CRAIG, J., dissenting.

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THE PEOPLE, for the use of John Beaird *et al.*

v

THE ILLINOIS AND ST. LOUIS RAILROAD AND COAL COMPANY.

Filed at Mt. Vernon November 8, 1887.

1. RAILROADS—*neglect to furnish transportation for coal not yet mined.* The statute, which provides that "every railroad corporation in the State shall start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or offered for transportation," can not be so extended as to include coal in the earth, to be dug and raised from the mines after cars are furnished, so that the carrier, for any neglect in that regard, will be subject to the treble penalty provided in the statute.

2. APPEAL—*reviewing action of Appellate Court—only as to matters of record, and upon assignment of error.* The action of the Appellate Court in refusing to allow an amendment of the record on petition for a rehearing, so as to obviate an error apparent in the record, can not be reviewed by this court, when such refusal is not assigned for error, and when the stipulation of the parties to amend the transcript of the record from the trial court is not made a part of the record of the proceedings in the Appellate Court.

3. SAME—*what becomes a part of the record.* The statement of the clerk of the Appellate Court, that a stipulation of the parties in a case was filed in that court, giving a copy thereof, will not make the stipulation a part of the record.

4. SAME—*examining opinion of Appellate Court—reviewing facts.* This court can not look into the opinion of the Appellate Court to learn on what

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its judgment was based, nor will it examine the evidence to ascertain whether the Appellate Court found correctly as to the facts in the case.

5. *SAME—non-recital of facts by Appellate Court.* If the Appellate Court does not recite the facts of the case in its final order, it will be deemed to have found them the same as the trial court.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. GEORGE W. WALL, Judge, presiding.

Mr. R. A. HALBERT, and Mr. E. L. THOMAS, for the plaintiffs in error.

Messrs. G. & G. A. KOERNER, for the defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This cause was originally commenced by John Baird and Charles Schroeter, as partners, against the Illinois and St. Louis Railroad and Coal Company, in the circuit court, to recover damages for the failure of defendant to furnish cars and transport coal for plaintiffs, as it is alleged it was its duty under the law. It seems, however, the trial in the circuit court was had on an amended declaration, filed by leave of court on the 7th day of March, 1883, in which plaintiffs claimed treble damages, under the statute, for the failure of the defendant to perform the duty it is alleged it owed to plaintiffs in that regard. Among other pleas to that amended declaration there was one of the Statute of Limitations of two years, to which it appears the trial court sustained a demurrer. At the trial, plaintiffs obtained a verdict, upon which the court rendered judgment. That judgment, on the appeal of defendant, was reversed by the Appellate Court for the Fourth District, and judgment rendered against plaintiffs for costs.

The errors assigned upon the record of the Appellate Court are, first, the Appellate Court erred in reversing the judgment of the circuit court; and second, the Appellate Court erred in not affirming the judgment of the circuit court.

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The first point made against the judgment of the Appellate Court is, that court found the circuit court erred in sustaining a demurrer to the plea of the Statute of Limitations of two years, pleaded to the amended declaration filed March 7, 1883. There is nothing in the judgment of the Appellate Court to show what that court found in regard to that plea, or anything else. It is a simple judgment of reversal, and nothing more.

Counsel suggest that other declarations, from June 9, 1882, claiming treble damages by virtue of the statute, the same as the declaration of March 7, 1883, had been filed; but the Appellate Court not finding either of these declarations in the record, although admitted by both parties in their briefs to have been filed in the court below, refused to take any notice of the admission; and as the amended declaration of March 7, 1883, when compared with the first declaration, showed a new cause of action, in that it claimed treble damages under the statute, held the circuit court erred in sustaining the demurrer to the plea of the Statute of Limitations of two years. It is frankly admitted by counsel, if no such declaration had been in fact filed, the ruling of the Appellate Court would undoubtedly have been correct. It is conceded, now, that the transcript filed in the Appellate Court, and upon which that court pronounced its judgment, did not contain any intermediate declarations which it is said were in fact filed in the circuit court.

As soon as the decision of the Appellate Court was announced, plaintiffs filed a petition for a rehearing, under the rules of that court, and in order to correct the omission in the transcript in regard to such amended declaration, it is said, by stipulation of parties, the declaration of June 9, 1882, (a copy of which is also filed, and is now exhibit "B," to the original transcript,) should be taken by the court as a part of the original record. The complaint is, the court refused to notice this amendment to the record for the reason no suggestion of diminution of record was made in apt time. There are two conclu-

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sive reasons why the action of the court in this regard can not be reviewed in this court: First, it is not assigned for error that the Appellate Court erred in refusing to allow the transcript of the record to be amended by the stipulation of the parties; and second, the alleged stipulation of the parties to amend the transcript of the record does not appear in the record of the Appellate Court in such manner as it can be noticed by this court. The clerk of the Appellate Court states such a stipulation of parties was filed, and gives a copy of it; but that does not make it a part of the record. The record does not contain any order in regard to the stipulation of the parties whatever. There is copied into the record what seems to be a brief opinion delivered by the court at a subsequent date,—perhaps in term time, although it is not so stated in the record,—on denying the petition for a rehearing, in which it is said: "The record remains the same as when the case was previously examined. In fact it is admitted, that without some special showing no diminution of the record could at this time be suggested. We are compelled, therefore, to reconsider the case with reference to the two declarations appearing in the case, only." There is no order of the court entered of record either denying or granting leave to amend the transcript of the original record, by stipulation or otherwise, and there is therefore nothing for this court to review in that regard.

The second point made is said to arise upon the construction of the statute. The amended declaration of March 7, 1883, seems to have been framed under the act of March 31, 1874, since amended by the act of 1883. (Sess. Laws of 1883, page 125.) Here, again, it may be said, as the fact is, it does not appear from the judgment, or elsewhere in the record, that the Appellate Court construed this, or any other section of the statute, in making its decision. If it were permissible to examine the published opinion of the court in this case, (19 Bradw. 141,) to ascertain what views the court entertained of the meaning of the statute under which the action was brought,

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it will be seen the court held that provision of the statute in regard to carrying freights, which declares, "as shall, within a reasonable time previous thereto, be ready or offered for transportation," can not be extended so as to include coal in the earth, to be dug and raised from the mines after cars are furnished, so that the carrier, for any neglect in that regard, would be subject to the penalty of treble damages provided by the second section of the act. That construction seems reasonable, and one that this court would undoubtedly adopt as the true meaning of the statute.

Lastly it is said, as the Appellate Court did not find the facts as required by statute, upon which it based its decision, and make them a part of its judgment, it will be deemed to have found them as the trial court did. Conceding the rule to be, as it no doubt is, if the Appellate Court finds the facts differently from the trial court it must embody the same in its judgment, and unless it does so it will be taken that it found the facts as the trial court did, still it is not seen, from anything in this record, how the plaintiff is prejudiced in that respect. It is said the Appellate Court reversed the judgment of the trial court because "there is neither allegation nor proof that the appellees (plaintiffs) had coal ready, or that they offered coal for shipping." Certainly it is not the duty of this court to examine the evidence to ascertain whether the Appellate Court found correctly as to the questions of fact in the case. It is no doubt for that reason plaintiffs have not abstracted the evidence said to be contained in this record, for the consideration of this court.

Being unable to discover any error in the record as the case comes before this court, the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

Syllabus. Brief for the Plaintiff in Error.

JOHN FINLEY HOKE

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa November 11, 1887.

1. **CONFLICT OF LAWS—State and Federal jurisdiction—generally.** A State has the same jurisdiction over all persons and things within its territorial limits, as any foreign nation, when that jurisdiction is not surrendered, or restrained by the constitution of the United States, and all those powers which relate to merely municipal legislation, or what may be called internal police, are not thus surrendered or restrained; and consequently, in relation to these, the authority of the States is complete, unqualified and exclusive.

2. **SAME—State and Federal courts—concurrent jurisdiction in criminal offences—punishment under different jurisdictions for the same act.** A general grant of jurisdiction to the Federal courts by act of Congress, is not, of itself, sufficient to vest exclusive jurisdiction in those courts, of all crimes and offences cognizable under the authority of the United States, unless so provided in the act.

3. The State courts have jurisdiction to try and punish one guilty of the forgery of a draft purporting to have been drawn by a national bank, although such person may have been a clerk or book-keeper of such bank, and may be liable to punishment under section 5209 of the Revised Statutes of the United States, for the same act.

4. The purpose of section 5209 of the Revised Statutes of the United States, is the protection of national banks, and the punishment of breaches of trust on the part of those holding fiduciary relations toward such banks. It is not leveled against the common law crime of forgery, but against a breach of trust, and the offence is made only a misdemeanor. The State law against forgery is in no way repugnant to that section.

WRIT OF ERROR to the Circuit Court of Peoria county; the Hon. T. M. SHAW, Judge, presiding.

Messrs. SWETT, GROSSCUP & SWETT, for the plaintiff in error:

The offence charged in the proof was cognizable in the Federal courts, and was therefore excluded from the jurisdiction of the State courts. Rev. Stat. of U. S. sec. 5209; Act of Congress of March 3, 1873, sec. 1; *Houston v. Moore*, 5 Wheat.

Briefs for the People.

1; *Fox v. State*, 5 How. 410; *Moore v. Illinois*, 14 id. 13; *Ex parte Bridges*, 2 Wood, 428; *Ex parte Royall*, 117 U. S. 253; *Ex parte Houghton*, 7 Fed. Rep. 657; *State v. Adams*, 4 Blackf. 146; *Commonwealth v. Felton*, 101 Mass. 204; 1 Kent's Com. 398.

Mr. GEORGE HUNT, Attorney General, for the People:

This is an offence against the State, and may be punished in the State courts. *Commonwealth v. Luberg*, 94 Pa. St. 85; *Dashing v. State*, 78 Ind. 357; *Hammond v. State*, 14 Md. 149; *Fox v. State*, 5 How. 433; *United States v. Marigold*, 9 id. 560; *People v. Kelly*, 38 Cal. 145; *Moore v. People*, 14 How. 13.

The crime of forgery is not identical with that created by section 5209 of the United States statute. 4 Blackstone's Com. 436; Chitty on Crim. Law, 451; 2 Russell on Crimes, 41; Archbold's Crim. Pl. 82; 3 Greenleaf on Evidence, sec. 36; *Freeland v. People*, 16 Ill. 380.

That plaintiff in error has committed the offence or offences which may be punished under either or both the State and United States laws, can not deprive the State-courts of jurisdiction. *United States v. Marigold*, 9 How. 560; *Fox v. State*, 5 id. 410; *Commonwealth v. Fuller*, 8 Metc. 313; *Harlan v. People*, 1 Doug. 207; *State v. Brown*, 1 Hayw. 116; *Phillips v. People*, 55 Ill. 433; *Ex parte Rogers*, 10 Tex. App. 665; *Gardner v. People*, 20 Ill. 430; *Wragg v. Penn Township*, 94 id. 11; *Robbins v. People*, 95 id. 175.

Mr. J. M. NIEHAUS, State's Attorney, and **Mr. N. E. WORTHINGTON**, also for the People:

The right to punish crime is inherent in the State, and has never been surrendered. *Eells v. People*, 4 Scam. 498; *Commonwealth v. Luberg*, 9 Pa. St. 85; *Harlan v. People*, 1 Doug. 210; 1 Kent's Com. 387; 2 Story on Const. 619; Serg. on Const. Law, 275; *Calder v. Bull*, 3 Dall. 386; *Sturges v. Crow-*

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ingshield, 4 Wheat. 193; *Dunne v. People*, 94 Ill. 141; *Hawthorne v. People*, 109 id. 302.

The offence is not the same under both laws. Any individual, whether connected with a national bank or not, who unlawfully takes a bill of exchange signed in blank by the cashier of a bank, fills up the blank, and negotiates it with intent to defraud, is guilty of forgery. *Wilson v. South Park Commissioners*, 70 Ill. 46; 2 Russell on Crimes, 321; Archbold's Crim. Pr. 342; *Rex v. Birket*, 1 British C. C. 86; *Regina v. Bateman*, 1 Cox C. C. 186; *Regina v. Beard*, 34 Eng. C. L. 497; *Kroeger v. State*, 47 Mo. 552; *People v. Graham*, 6 Park. Cr. 135.

An individual may, by the same act, subject himself to liabilities to different jurisdictions; and yet this is not double punishment where the *status* of the offences is different. *Fox v. State*, 5 How. 410; *Moore v. State*, 14 id. 13; *United States v. Marigold*, 9 id. 560; *Hendrick's case*, 5 Leigh, 707.

Two offences may be included in the same act. *Hankins v. People*, 106 Ill. 628.

The same act may constitute an offence both against the State and a municipal corporation, and both may punish it without violation of any constitutional principle. *Robbins v. People*, 95 Ill. 175; Cooley's Const. Lim. 199.

That the same act may be an offence against two different jurisdictions is no longer an open question. *Ambrose v. State*, 6 Ind. 351; *Hankins v. People*, 106 Ill. 629.

And may be a violation of distinct and different laws, and punishment may be inflicted by different sovereignties. *Eells v. People*, 4 Scam. 514.

Mr. CHIEF JUSTICE SHELDON delivered the opinion of the Court:

The plaintiff in error, John Finley Hoke, was convicted of the crime of forging a draft for \$1000, purporting to be drawn by the Merchants' National Bank of Peoria, upon the Mer-

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chants' Exchange National Bank of New York, of the date of September 1, 1885, and was sentenced to imprisonment in the penitentiary for the term of five years.

It appears from the evidence that Hoke was a book-keeper in the Merchants' National Bank of Peoria, a corporation organized under the National Banking act, and there he, without authority, filled up, in his handwriting, the draft in question, which had been signed in blank by the assistant cashier, and delivered the same to one G. I. Brown in payment of margins upon certain deals of Hoke on the board of trade, and that no money was paid therefor by Brown to Hoke or the bank. Hoke at the time made false and untrue entries in the books of the bank, in order to conceal the fact of the unlawful issuance of the draft. The draft was afterward paid by the Merchants' National Bank in the ordinary course of business.

Counsel for plaintiff in error, in the opening of their written argument, say: "We desire expressly to restrict the review of this case to but one question, viz: Did the court have jurisdiction, and did it err in refusing appellant's instructions on that point? We contend that the offence charged in the proof against appellant was cognizable in the Federal courts, and was therefore excluded from the jurisdiction of the State court."

Section 5209 of the Revised Statutes of the United States is as follows:

"Every president, director, cashier, teller, clerk or agent of any association, (referring to national banks,) who embezzles, abstracts or willfully misapplies any of the moneys, funds or credits of the association, or who, *without authority from the directors*, issues or puts in circulation any of the notes of the association, or who, without such authority, issues or puts forth any certificate of deposit, *draws any order or bill of exchange*, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree, or who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the

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association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, and every person who, with like intent, aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

It is urged that the offence established by the proof upon the trial of this case, is an offence under this section of the statutes of the United States, and that, being an offence thereunder, it is punishable in the United States courts alone.

The act of Congress, March 3, 1875, (sec. 1, Sup. Rev. Stat. 173,) provides: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, etc., * * * arising under the constitution or laws of the United States, or treaties made, etc. * * * And shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law."

Chancellor KENT, in respect of the concurrent power of the States in matters of judicial cognizance, observes: "In the judicial act of 1789, the exclusive and concurrent jurisdiction conferred upon the courts by that act were clearly distinguished and marked. The act shows, that in the opinion of Congress a grant of jurisdiction, generally, was not, of itself, sufficient to vest an exclusive jurisdiction. The judicial act grants exclusive jurisdiction to the circuit courts, of all crimes and offences cognizable under the authority of the United States, except where the laws of the United States should otherwise provide; and this accounts for the proviso in the act of 24th February, 1807, (c. 75,) and in the act of 10th of April, 1816, (c. 44,) concerning the forgery of the notes of the Bank of the United States, declaring that nothing in that act contained should be construed to deprive the courts of the individual

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States of jurisdiction, under the laws of the several States, over offences made punishable by that act. There is a similar proviso in the act of 21st of April, 1806, (c. 49,) concerning the counterfeiting of the current coin of the United States. Without these provisos, the State courts could not have exercised concurrent jurisdiction over those offences, consistently with the judicial act of 1789." 1 Kent's Com. (1st ed.) 373. And yet, in *Prigg v. Pennsylvania*, 16 Pet. 627, in asserting the exclusive power of Congress over the subject of fugitive slaves, Justice STORY observes: "To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be understood, in any manner whatever, to doubt or to interfere with the police power belonging to the States in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the States, and has never been conceded to the United States." And in *City of New York v. Miln*, 11 Pet. 138, it was said: "That a State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered, or restrained by the constitution of the United States. * * * That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these the authority of the State is complete, unqualified and exclusive."

In *Eells v. The People*, 4 Scam. 498, Eells had been indicted under a statute of this State making it an offence to harbor and secrete any negro slave, or to hinder or prevent the lawful owner of such slave from re-taking him, and the point was made in the defence, but not sustained, that the offence described in the indictment was precisely such an offence as was indictable under the fugitive slave law of Congress of 1793. The Court, by SHIELDS, J., there said: "This (the State) law prescribes a rule of conduct for our own citizens. If the State

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can do this, (and I hardly think the power questionable,) it can punish those who violate the rule. If a State has power to regulate its own affairs, it has the power to define offences and punish offenders." And again: "It is also said that this law may punish a man twice for the same offence. There is no force whatsoever in this objection. The offences are separate and distinct,—violations of distinct and different laws,—and the punishments inflicted by different sovereignties." The conviction in the case was affirmed by the Supreme Court of the United States in *Moore v. The People*, 14 How. 13, Moore being the executor of Eells. It was there said by the court: "But admitting that the plaintiff in error may be liable to an action, under the act of Congress, for the same acts of harboring and preventing the owner from ré-taking his slave, it does not follow that he would be twice punished for the same offence. * * * The same act may be an offence or transgression of the laws of both," (State and United States,) for which, as afterwards said, the offender is justly punishable. And it was there further said: "The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens, and of the public peace, has never been surrendered by the States or restrained by the constitution of the United States."

The indictment in this case is for the crime of forgery. In the offence described in section 5209, above, of the United States law, which is claimed as being the same as that shown by the proof here, the offender is an officer or clerk of a national bank, who, without authority from the directors, draws any order or bill of exchange, with intent to injure or defraud, etc. The offences do not appear to be the same. Under this indictment for forgery there could not, we apprehend, be a conviction for the offence described in section 5209. Nor would an indictment charging merely the offence described in that section, sustain a conviction for forgery. The objects of the United States law and the State law appear to be different. The

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purpose of the former seems to be for the protection of national banks; to punish breaches of trust on the part of those holding fiduciary relations toward such banks; to punish what is of the nature of a private crime. The State law is for the protection of the public against the public mischief to the people of the State from the perpetration of forgeries. The United States statute is not leveled against the crime of forgery, but against a breach of trust. The offence is called but a misdemeanor. There is no apt language in section 5209 to describe forgery. Whenever Congress has legislated with respect to that offence, it has used the language which is appropriate for its description. Thus, under title 70, (Rev. Stat. of U. S.) section 5414 provides: "Every person who, with intent to defraud, falsely makes, forges, counterfeits or alters any obligation," etc., of the United States, shall be punished by a fine of not more than \$5000, and by imprisonment at hard labor not more than fifteen years. Section 5415: "Every person who falsely makes, forges or counterfeits," etc., any of the circulating notes of any banking association authorized by the United States, shall be imprisoned at hard labor, not less than five nor more than fifteen years, and fined not more than \$1000. And so of other sections providing for the punishment of forgery, where the United States may be injured, the description of the offence is in the like apt language. The punishment there denounced against the crime of forgery is greater than that prescribed in section 5209 for the breach of trust there made punishable, exceeding it by five years in extent of imprisonment. And section 5328, under this same title, (70,) declares, "nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

There is thus manifestation in the legislation of Congress that section 5209 is not directed against the crime of forgery; that the offence provided against in that section is of less degree than that of forgery; and that it was not the intent to sus-

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pend, in any respect, the jurisdiction of the State courts over the crime of forgery under State laws, inasmuch as the United States law providing for the punishment of forgery declares that nothing therein shall be held to take away or impair the jurisdiction of the State courts under State laws. The State law is in no way repugnant to section 5209, and is not at all in the way of supplement to the legislation therein. It is but a statute for the punishment of the common law crime of forgery. Because it happens to appear in the proof in this case that the wrongdoer was the clerk of a national bank, and that the draft was drawn without authority from the directors of the bank, thus presenting the peculiar elements which constitute the offence in said section 5209, and because, may be, the proof shows nothing more than what amounts to the offence described in that section, we do not think that thereby the jurisdiction of the State court over the crime of forgery should be taken to be suspended.

The cases cited in behalf of the plaintiff in error are mostly cases relating particularly to the execution of some Federal statute, or to some act done within some Federal tribunal. The distinction is taken in *State v. Pike*, 15 N. H. 83, between cases where the alleged criminal act is done in the course of the execution of the laws of the United States, and where not so done, and favoring the idea that the exclusive jurisdiction of the Federal courts may exist in the former class of cases, and not in the latter. The same distinction was recognized in *The People v. Kelly*, 38 Cal. 145, as one properly taken. The offence here charged was not committed in the course of the administration of any law of the United States. In *Commonwealth v. Luberg*, 94 Pa. St. 85, a conviction in the State court, of the offence of making false entries in the books of a national bank by the receiving teller of the bank, was sustained. But in *Commonwealth v. Felton*, 101 Mass. 204, it was held that the offence of the embezzlement of the funds of a national bank by its cashier was exclusively cognizable by the courts of the

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United States, and that it was taken out of the jurisdiction of the State court, by the acts of Congress.

While the case does not seem to be entirely clear, upon the authorities, we are disposed to hold that the crime charged in the indictment, or that established by the proof, is not excluded from the jurisdiction of the State court.

The judgment will be affirmed.

Judgment affirmed.

123	520
49a	310
123	520
158	518
122	520
204	*548
122	520
207	198
122	520
212	* 84
212	* 85
212	*287

HENRY H. GAGE

v.

FRED C. CURTIS *et al.*

Filed at Ottawa November 11; 1887.

1. **CLOUD UPON TITLE—who may complain—remedy at law or in chancery.** Unless the complainant is in possession of the land, or it is vacant and unoccupied, a bill will not lie to have a deed set aside as a cloud on the title; and where the bill fails to show such jurisdictional fact, no relief can be granted, but the party will be left to his remedy at law by action of ejectment.

2. **ALLEGATIONS AND PROOFS—must correspond—on bill to remove cloud upon title.** On bill to set aside certain tax deeds as clouds on the title of complainant, it is error to set aside any tax deeds other than those described in the bill as affecting the title. A complainant must stand or fall by the case he makes in his bill.

3. The validity of a tax deed, not described in a bill to remove clouds on the title to land, can not be insisted upon by the defendant as a defence to the suit, and much less can it be considered and condemned at the instance of the complainant, when no relief is asked in respect to it.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. GEORGE GARDNER, Judge, presiding.

Fred C. Curtis, Jacob Swart and Allen Bowersax filed their bill in chancery in the Superior Court of Cook county, against Henry H. Gage, alleging therein that they are the owners of certain lots in the Superior Court partition of the south-east

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quarter of the south-east quarter of section 22, township 38 north, range 14 east, in Cook county; that the property was owned by R. C. Fisher, M. A. Fisher, Goudy, Quackenbush and Armstrong, in undivided interests, and they procured a partition thereof by proceedings in the Superior Court of Cook county; that the commissioners appointed to make the partition divided the property into lots, and apportioned it among the several owners aforesaid, which was confirmed by the Superior Court; that the complainants derive title by conveyance from Rachel C. Fisher to the lots set off to her, as follows: Curtis owns 1, 2, 26, 27, 41, 42, 43, 64, 65, 66, 78, 79, 80, 81, 90, 91, 92, 110, 111, 112, 113, 117, 123, 124, 125, 130 and 131; Swart owns lots 52, 53, 93 and 116, and Bowersax owns lots 40, 54 and 115; that Rachel C. Fisher has, at all times, paid all taxes assessed upon her undivided interest before partition, and upon her lots after partition, up to the time of conveyance to complainants, since which time complainants have paid the same, so that there is no claim of any unpaid taxes or assessments against said lots. It is further therein alleged, that in 1870 the taxes on the undivided half of the land, other than the interests of said Fisher, were forfeited to the State, and added to the taxes of 1873 on the whole of the land, instead of being extended against an undivided half thereof; that in 1871 the taxes on an undivided quarter were also forfeited, and added to the tax of the whole, and on October 30, A. D. 1875, an undivided quarter of said quarter section was sold to Henry H. Gage for the tax of 1871, and an undivided half of said quarter section was sold to him for the taxes of 1870, and, not being redeemed, a deed was issued to him on March 13, 1877; that Rachel C. Fisher paid one-fourth of the second installment of the South Park assessment on said tract; that an owner of another undivided quarter appealed from the judgment therefor, but notwithstanding such appeal, sale was made to Henry H. Gage on December 4, 1874, and a deed was issued thereon to him on the 16th of October,

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1877; that Gage claims to have paid some tax or assessments on undivided interests in the said land, and on some lots in the subdivision, but that no such payments were or had been made for the taxes on the undivided interests of Rachel C. Fisher, nor upon any of the land set off to her; that complainants do not know who are the owners of the tracts so sold, but they say Rachel C. Fisher was not, and that all taxes upon her undivided quarter of the land, and the lots allotted to her, have been paid by her or her grantees and complainants. It is also further therein alleged, that Gage claims to be the owner by reason of such sale and conveyances of an undivided quarter and an undivided half of all lots so owned by complainants, and that he is entitled to the possession thereof, notwithstanding Rachel C. Fisher had paid in full all taxes levied and assessed upon her undivided fourth; that complainants have requested Gage and the owners of the other undivided interests to have the cloud removed, but they refuse to do so. The prayer is for an answer, but not under oath, and that it be decreed that Rachel C. Fisher's undivided quarter was not sold or conveyed on account of or for non-payment of taxes, and for general relief.

Henry H. Gage answered, that while seeking the aid of a court of equity, complainants do not offer to do equity. He denies the ownership claimed by the complainants, and alleges that he is, himself, the owner of the lots claimed by the complainants, and also that he owns the whole south-east quarter of the south-east quarter of section 22, township 38 north, range 14, west, derived by and through divers tax titles, and that his tax titles are evidenced by divers tax deeds, which said deeds are in his possession and ready to be produced at the hearing, as the court shall direct; and the other material allegations of the bill were denied. There was a replication to the answer, and, on hearing, the court found and decreed as follows, namely:

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"That on January 11, 1872, Rachel C. Fisher was the owner, in fee simple, of the undivided one-fourth of the south-east quarter of the south-east quarter of said section 22; that Martha A. Fisher owned a fourth, William C. Goudy owned a fourth, Peter Quackenbush an eighth, and Jonathan P. Armstrong an eighth; that afterwards Rachel C. Fisher caused a partition thereof to be made in the Superior Court of Cook county, and the same was partitioned into 140 lots, on January 14, 1877, of which lots Rachel C. Fisher was decreed to be the owner of lots mentioned in the bill; that Rachel C. Fisher has, at all times, (except in the case of the taxes of 1879, as hereinafter stated,) paid or duly redeemed from tax sale all taxes and all assessments levied on her undivided interest, and that after the partition, and until she sold them, (except in the case of the taxes of 1879,) for which year, however, said Henry H. Gage paid said taxes, under a claim of ownership or interest by virtue of the tax titles herein set forth, and there was no sale of any part of said property for taxes, imposition or assessment for that year, and that said complainant, her grantees, respectively, paid all taxes and assessments levied or assessed against their respective lots down to the filing of said bill, so there was then no valid claim for any unpaid or unredeemed taxes or assessments against either the said undivided one-fourth interest, or against the said lots so set off to her, owned by the complainants, respectively, as aforesaid.

"It further appears to the court that the complainants offered in evidence the following tax deeds, disclaiming any intention to prove the validity thereof, but claim that said deeds, each and all of them, and the sales therein recited, cast a cloud upon the title to the lots so owned by them, which said deeds were received and allowed to be read in evidence for that purpose, to-wit: First, tax deed dated June 20, 1877, to Henry H. Gage, recorded June 22, 1877, reciting sale of October 7, 1874, conveying an undivided half of the south-east quarter of the south-east quarter, aforesaid; second, tax deed to Henry H. Gage,

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dated March 13, 1877, recorded March 23, 1877, conveying to Henry H. Gage an undivided quarter of the south-east quarter of the south-east quarter aforesaid, reciting sale of October 30, 1874; third, tax deed to Henry H. Gage, dated March 13, 1877, recorded March 26, 1877, conveying an undivided quarter of the south-east quarter of the south-east quarter aforesaid, reciting sale of October 30, 1874; fourth, tax deed to Henry H. Gage, dated October 15, 1877, recorded October 19, 1877, conveying an undivided one-eighth of said forty acres, reciting sale of December 2, 1874; fifth, tax deed to Henry H. Gage, dated October 16, 1877, recorded October 20, 1877, conveying an undivided one-eighth of said forty-acre tract, reciting sale of December 2, 1874; sixth, tax deed to Henry H. Gage, dated June 26, 1880, recorded June 29, 1880, conveying an undivided quarter of said forty-acre tract, reciting sale of August 14, 1877; seventh, tax deed to Henry H. Gage, dated July 2, 1880, recorded July 3, 1880, conveying an undivided one-eighth of said forty-acre tract, reciting sale of August 14, 1877; eighth, tax deed to Henry H. Gage, dated July 15, 1880, recorded July 17, 1880, conveying an undivided one-eighth of said forty-acre tract, reciting sale of August 14, 1877; ninth, tax deed to Henry H. Gage, dated June 30, 1880, recorded July 1, 1880, conveying an undivided fractional part of said forty-acre tract, reciting sale of September 4, 1877; tenth, tax deed to Henry H. Gage, dated July 14, 1880, recorded July 15, 1880, conveying an undivided five-eighths of said forty-acre tract, reciting sale of September 4, 1877.

"It further appearing to the court that said several sales mentioned in said tax deeds were not sales of the undivided one-fourth of said Rachel C. Fisher, but by reason thereof there exists a cloud on the title of her interest and the lots so divided and set off to her, as aforesaid, which, at the time of the filing of the bill, were owned by the complainants; that the equities are with the complainants, and it is ordered and decreed that each, every and all of the taxes, impositions and

Brief for the Plaintiff in Error.

assessments for or on account of which each, every and all the sales hereinabove described and set forth, as far as they relate to or concern the said undivided one-fourth interest of said Rachel C. Fisher in said tract of land and the lots set off to her, were fully paid and discharged before such sale, or (in cases where sales were made) were by her duly redeemed, discharged and cancelled in apt time, and such taxes and assessments, each and every of them, the said sales, each and every of them, and the said hereinbefore described tax deeds, each and every of them, from and after the time of such payments and such redemptions, have not and do not now constitute or exist as any claim, lien, charge, imposition, cloud or incumbrance upon or against the said Rachel C. Fisher's undivided one-fourth interest, or the lots so set off to her, nor any of them; that the pretended claim of title to said undivided quarter of said Rachel C. Fisher, and to the several lots set off to her, made by Henry H. Gage in that behalf, are false and fraudulent in fact, law and equity, and of no valid standing, force or effect whatever, and the apparent cloud so by reason of the premises aforesaid existing against or upon said undivided one-fourth interest of said Rachel C. Fisher, as well as the apparent clouds so existing upon or against the title of said complainants, and each of them, in and to the lots, (the lots aforesaid, alleged to be set off to Rachel C. Fisher,) and each and every of them, be and the same are hereby set aside, dispelled, removed, cleared off, and that title to said several lots so set off to her, the said Rachel C. Fisher, is hereby released, cleared and forever discharged therefrom.

"It is further ordered, adjudged and decreed that Henry H. Gage pay the costs of this action, and thereupon he prays an appeal to the Supreme Court, which is granted on his filing bond in \$300, and a certificate of evidence in twenty days."

Mr. AUGUSTUS N. GAGE, for the plaintiff in error:

There are only two cases under our law where a court of equity may entertain a bill to remove a cloud from the title to

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real estate. The first is where the complainant is in possession of the property, and the second is where the property is vacant and unoccupied. Rev. Stat. 1874, sec. 50, chap. 22; *Hardin v. Jones*, 86 Ill. 313; *Gage v. Abbott*, 99 id. 366, and cases cited; *Gage v. Griffin*, 103 id. 41.

He who seeks equity must do equity, and a complainant must come with a clean conscience. *Reed v. Tyler*, 56 Ill. 288; *Barnett v. Cline*, 60 id. 205; *Farwell v. Harding*, 96 id. 32; *Gage v. Busse*, 102 id. 592.

The allegations and proofs are at variance. *Hyde v. Heath*, 75 Ill. 381; *Gage v. Reed*, 104 id. 509.

Mr. J. A. SLEEPER, for the defendant in error.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

There are two grounds upon which the decree below must be reversed, without regard to whether the other grounds are well urged.

First—It is neither alleged that complainants are in possession of the property, nor that it is vacant and unoccupied, without one of which allegations the complainants must be remitted to their remedy at law, by action of ejectment. *Gage v. Griffin*, 103 Ill. 41; *Hardin v. Jones*, 86 id. 313; *Gage v. Abbott*, 99 id. 366.

Second—The deeds described in the bill, and which are sought to be removed as clouds, are, first, a deed made on March 13, 1877, pursuant to a sale made on October 30, 1875; and second, a deed made on October 16, 1877, pursuant to a sale made on December 4, 1874. But the decree describes, first, deed dated June 20, 1877, made pursuant to a sale on October 7, 1874; second, deed dated March 13, 1877, made pursuant to sale on October 30, 1874; third, deed dated March 13, 1877, pursuant to sale on October 30, 1874; fourth, deed dated October 15, 1877, pursuant to sale on December 2, 1874; fifth, deed dated October 16, 1877, pursuant to sale on Decem-

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ber 2, 1874; sixth, deed dated June 26, 1880, pursuant to sale on August 14, 1877; seventh, deed dated July 2, 1880, pursuant to sale on August 14, 1877; eighth, deed dated July 15, 1880, pursuant to sale on August 14, 1877; ninth, deed dated June 30, 1880, pursuant to sale on September 4, 1877; tenth, deed dated July 14, 1880, pursuant to sale on September 4, 1877. And it is afterwards decreed, that "the herein-before described tax deeds, each and every of them, from and after the time of such payments and such redemptions, have not and do not now constitute or exist as any claim, lien, charge, imposition, cloud or incumbrance upon or against the said Rachel C. Fisher's undivided one-fourth interest, or the lots so set off to her, nor any of them, * * * and the apparent cloud so by reason of the premises aforesaid existing against or upon said undivided one-fourth interest of said Rachel C. Fisher, as well as the apparent clouds so existing upon or against the title of said complainants, and each of them, in and to the lots, * * * and each and every of them, be and the same is hereby set aside, dispelled, removed, cleared off." The rule is, that the complainant must stand or fall by the case he makes in his bill. (*White v. Morrison*, 11 Ill. 361; *Rowan v. Bowles*, 21 id. 17; *Chaffin v. Heirs of Kimball*, 23 id. 36; *Ohling v. Luitjens*, 32 id. 23.) And the decree must conform to the prayer of the bill. *Ward v. Enders*, 29 Ill. 519; *Hall et al. v. Towne*, 45 id. 493.

The validity of the deeds not described in the bill could not have been insisted on by the defendant as a defence to the suit. (*Gage v. Mayer*, 117 Ill. 632; *Parker v. Shannon*, 114 id. 192.) Much less could they be considered and condemned at the instance of the complainant, when they were not described, and no relief was asked respecting them in the complainant's bill.

The decree is reversed and the cause remanded.

Decree reversed.

Syllabus.

MARY L. GORHAM *et al.*

v.

HANNAH R. DODGE.

Filed at Ottawa November 11, 1887.

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130	641
133	528
133	390
122	528
134	504
122	528
150	252
122	528
164	606
63a	399
122	528
170	82
122	528
192	5483
192	5484
122	528
194	5393
122	528
204	5 76
122	528
209	5480

1. **STATUTE OF FRAUDS—*parol agreement to convey land—performance to take a case out of the statute.*** In case of a parol purchase of land, where the purchase money has been paid, possession given to the purchaser, and he enters under the contract, and makes lasting and valuable improvements, a specific performance will be enforced, although the Statute of Frauds may be pleaded.

2. **SAME—*taking possession, as an element in performance.*** Full payment of the purchase money for real estate verbally agreed to be conveyed, is not, of itself, sufficient to take the agreement out of the Statute of Frauds. Possession must also be taken under the contract.

3. An aged mother offered to give her daughter her homestead if the latter would come there and live with her as long as she lived, the mother to furnish the home, provide for the house, and bear all the expenses, so that the daughter should be at none whatever. Under this offer they both went to the homestead, where they lived until the mother's death, the daughter paying no taxes and making no improvements: *Held*, that the daughter did not thereby acquire possession of the property, during the mother's life, so as to take the case out of the Statute of Frauds.

4. **SPECIFIC PERFORMANCE—*of the performance by complainant.*** A mother, of advanced years and in feeble health, made a verbal agreement, in May, with her daughter, to give her a house and lot at the death of the former if the latter would come to her house and live with her until her death, and care for her. The daughter did nothing until in October, and during the last sickness of the mother, in January, following, absented herself for two weeks and three days before the mother's death, leaving no one to take care of her, and her son, on being notified of the fact, employed a nurse for her: *Held*, that this was not such a performance of the contract on the part of the daughter, as would call upon a court of equity to enforce it.

5. **WILL—*taking under devise, as an estoppel to question any part of the will.*** It is a well settled rule in equity, that a person, by taking any beneficial interest under a will, is thereby held to confirm and ratify every other part of the will,—or, in other words, he shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat or in any way prevent the full effect and operation of any part of the will.

Brief for the Appellants.

6. So where a testatrix bequeathed to her daughter \$700, and devised her homestead to her son, and the daughter accepted the bequest to her, it was held, that the latter was thereby estopped from enforcing the specific performance of a parol agreement of the testatrix to give the homestead to the daughter on the death of the former. Having elected to take under the will, the daughter could not set up a claim which would defeat the devise to the son.

Appeal from the Circuit Court of Kane county; the Hon. Isaac G. Wilson, Judge, presiding.

Mr. J. W. RANSTEAD, for the appellants:

A specific performance will not be decreed except upon clear proof. *Carver v. Lasater*, 36 Ill. 182; *Gosse v. Jones*, 73 id. 508; *Langston v. Bates*, 84 id. 524; *Allen v. Webb*, 64 id. 342; *Wallace v. Rappleye*, 103 id. 229.

The complainant failed to perform the alleged contract on her part. The performance was not such as to invoke the aid of a court of equity.

To take a case out of the Statute of Frauds, it is necessary to show a part performance,—that is, an act referring to and resulting from the agreement, and such that the party would suffer an injury amounting to a fraud by the refusal to execute the contract. *Frame v. Dawson*, 14 Ves. 387; *Glass v. Hulbert*, 102 Mass. 24; *Wallace v. Rappleye*, 102 Ill. 229.

The person to whom a verbal promise to convey land has been made, stands in the nature of a purchaser, and, like any other purchaser, must prove the contract; that the land was clearly designated; that open, notorious and exclusive possession was taken and maintained under the contract, and that improvements were made on the faith of the promise. *Moore v. Small*, 19 Pa. St. 461.

Possession must be exclusive, and not jointly with the vendor. *Frye v. Shepler*, 7 Pa. St. 93.

The rule seems to be settled, that where the acts done can be compensated by damages, recoverable in an action at law,

Brief for the Appellee. Opinion of the Court.

no performance will be decreed. *Parkhurst v. Van Courtland*, 1 Johns. 284; *Frame v. Dawson*, 14 Ves. 387.

There is no pretense in this case that any improvements were made or any money expended on the property by the complainant.

We contend that the complainant had the right of election whether she would rely on her pretended contract with her mother for the conveyance of the homestead, or whether she would take this bequest under her mother's will. She did take the bequest. We claim that by this election she is estopped from claiming anything other or additional from her mother or representatives. *Wilbanks v. Wilbanks*, 18 Ill. 17; 2 Williams on Executors, 1441; *Hyde v. Baldwin*, 17 Pick. 303.

Mr. W. R. S. HUNTER, for the appellee:

The Statute of Frauds presents no defence, as complainant took possession under the contract, and paid the full consideration she agreed to pay, or, in other words, fully performed her part of the contract. *Warren v. Warren*, 105 Ill. 568; *Smith v. Yocum*, 110 id. 142; *McDowell v. Lucas*, 97 id. 489; *McClure v. Otrich*, 118 id. 320; *Bright v. Bright*, 41 id. 97; *Kurtz v. Hibner*, 55 id. 514.

The bequest and the purchase are not inconsistent with each other. The will, after providing for the payment of debts and the legacy, gave all the residue of the testatrix' estate to her son. Having disposed of the lot in her lifetime, it did not pass by the will.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, brought by Hannah R. Dodge, to enforce the specific performance of a parol agreement alleged to have been made between the complainant and her mother, Sarah Gorham, in 1882, under which it is claimed that complainant agreed to reside with and take care of her mother

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during her natural life, on certain premises in the city of St. Charles, and in consideration of such services the mother agreed to convey the property to complainant. William J. Gorham, and other heirs-at-law of Sarah Gorham, deceased, were made parties defendant to the bill, but before the hearing William J. Gorham died, and his administratrix and heir-at-law were made parties defendant. William J. Gorham, in his lifetime, and his heirs, after his death, put in answers to the bill. In the answers, the contract relied upon by complainant is denied, the Statute of Frauds is pleaded, and in addition it is set up, that on the 20th day of April, 1881, the said Sarah Gorham made and executed a last will and testament; that in March, 1883, said will was duly admitted to probate in said Kane county, in and by which said testatrix, among other legacies, gave and bequeathed to the said Hannah R. Dodge the sum of \$700, and devised to said William J. Gorham the premises in controversy in this suit, and that afterwards he took out letters of administration on said estate, and paid all debts and legacies, and, among others, a legacy of \$700, and interest, to said complainant, and reported the same to said county court, and was duly discharged, and the estate was declared settled; and she avers that by reason of the will, and legacy of \$700 and interest, and the acceptance of said legacy by the complainant, she has elected to accept said will, and her legacy thereunder, in lieu of all other rights, if any, and that in equity she is now estopped from claiming and setting up title to said property by reason of any agreement for the sale and conveyance between her and the said Gorham, as set forth in said bill of complaint. On the hearing, on the pleadings and evidence, the court rendered a decree in favor of the complainant.

The evidence in reference to the contract is quite brief, and is that of one witness, Sarah H. Dodge, and was substantially as follows: "I live at Gardner, Illinois. Am a grand-daughter of Sarah Gorham and a daughter of complainant. Sarah

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Gorham died in January. I saw her in May previous, at William Gorham's, in Du Page county, and that was the last time I saw her before her death. I had a talk with her in reference to letting Hannah Dodge have the property in St. Charles. I was at St. Charles, and went to see grandmother. She asked me to room with her. After we went to her room, she commenced talking about her private affairs, and said she was not satisfied with her present home, and wanted to go back to St. Charles; said she was too old to live there alone, and would give the place to me or my mother if we would come there and live with her, and all the things she had there with her. If we would not come she would give it to some stranger, and that was to be the consideration,—she was to live with her as long as she lived, but they must agree to stay with her. I told her I thought mother would come and stay with her. I asked her at the time if she did not think it would be better to stay where she was, and she said no,—she would go there, and if I or my mother would not come, she would get some stranger. I said we had some work to do at home, and asked her if she could stay there some eight or ten days until we could rent the place. She did not want me to tell any one until I had spoken to my mother, and if mother would come she was to write to her not to have her say anything about the bargain. I went into Chicago, and from thence I went home and told my mother about this matter. I told mother what grandmother said, and she, after thinking it over, said she would go."

On cross-examination, the witness testified: "She told me she had \$400 with which to commence housekeeping; that she would provide for the house and be to all expenses, and mother was to be at no expense whatever. I understood from my grandmother, who was then eighty-two years old, that if mother would go and live with her she would pay her board and all the expenses of the house, and as soon as she died mother would have the property. It was about the last of May or the first of June that I had this conversation with my

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grandmother. Mother went there in the last of September or first part of October, and grandmother died the next January."

The Statute of Frauds having been set up in the answer, the first question to be considered is, whether anything was proven which will take the case out of the operation of the statute. It is conceded that there is no memorandum in writing of the contract, but it is claimed that there has been a performance of the contract, and such performance is sufficient to take the agreement out of the operation of the Statute of Frauds.

This court has held, in a number of cases, and the law may be regarded as well settled, that in a case of a parol purchase of lands, where the purchase money has been paid, possession surrendered to the purchaser, and he enters under the contract and has made lasting and valuable improvements, a specific performance will be enforced, although the Statute of Frauds may be pleaded. (*Temple v. Johnson*, 71 Ill. 14.) But the case under consideration does not fall within the rule indicated. No money was paid, no improvements were made on the property, and, in our judgment, the evidence fails to show possession, by the complainant. The property, as disclosed by the evidence, had been formerly occupied by Sarah Gorham as a homestead. She had left it for a time and was residing with her son. Becoming dissatisfied, she made up her mind to return to the homestead in St. Charles, the property in question. She desired the complainant to reside with her on the property, and if she would not accept, she declared the intention to get a stranger. The offer made complainant, as shown by the only witness to the contract which complainant accepted, was as follows: "She (Mrs. Gorham) said she was too old to live there (on property in question) alone, and would give the place to me or my mother if we would come there and live with her. She was to live with her as long as she lived." But this was not all. The witness further testified that Mrs. Gorham had \$400 with which to commence housekeeping; that she was to furnish the house, provide for the home, be at all expenses,

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and complainant was to be at no expense whatever. These are the circumstances under which Mrs. Gorham returned to her property, and under which she and the complainant resided there together, and, in our judgment, it is a clear proposition that complainant acquired no possession of the property while Mrs. Gorham lived. She was there as a mere employe while the mother occupied the property. She had no duty to perform except to take care of her mother. She asserted no ownership of the property, she made no repairs, paid no taxes, indeed she did nothing to indicate a possession or ownership of the property.

Should it be conceded that the complainant paid the purchase money,—or, what may be regarded as an equivalent, performed the labor agreed upon for her mother,—she could not recover, because, as held in the case cited *supra*, full payment of the purchase money for real estate verbally agreed to be conveyed, is not, of itself, sufficient to take the agreement out of the Statute of Frauds,—possession of the property must also be taken under the contract. But we are not satisfied, from the evidence, that the complainant performed the contract as was agreed upon. The evidence shows that the arrangement was that complainant should go and live with her mother during the lifetime of the mother,—that she was to take care of the old lady. This arrangement was made in May, under the expectation that within two or three weeks complainant would enter upon the performance of the contract; and yet she did nothing until October. But this is not so important. During the last sickness of Sarah Gorham the complainant absented herself, as the evidence shows, for two weeks and three days, leaving no person to care for the old lady, who was then unable, from advanced age and poor health, to care for herself, and the son being notified of the fact, employed a nurse to go to the house and care for the old lady. This was not such a performance of the contract as would call upon a court of equity to enforce it. The sole object of the contract was, that Mrs.

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Gorham, advanced in years as she was, should have the constant services of the complainant, and at no time was it more important that those services should be given than in the last sickness.

There was also another defence interposed, which was sufficient to defeat a decree. It was proven on the hearing that Sarah Gorham, on the 20th day of April, 1881, executed a will, which was admitted to probate in the county court of Kane county, in March, 1883. By the will the testatrix bequeathed to complainant \$700, and to William J. Gorham she devised the property in controversy. William J. Gorham was named as executor in the will. He qualified as such, paid all debts, and the legacy of \$700 to the complainant. After the expiration of two years he rendered an account to the county court, which was approved, and the estate was declared settled, and the executor discharged. The complainant having elected to take under the will of Sarah Gorham, can she set up a claim which will defeat some other provision of the will? The law is well settled that she can not. (*Wilbanks v. Wilbanks*, 18 Ill. 17; *Thelenson v. Woodford*, 13 Ves. 210; 2 Williams on Executors, 1441; *Hyde v. Baldwin*, 17 Pick. 303.) In the last case cited, the rule is clearly stated by Chief Justice SHAW, as follows: "It is now a well settled rule in equity, that if any person shall take any beneficial interest under a will, he shall be held thereby to confirm and ratify every other part of the will,—or, in other words, a man shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat or in any way prevent the full effect and operation of every part of the will." Here, the property in question was specifically devised by Sarah Gorham, as her own property, to William J. Gorham. When this fact became known to complainant, she was bound to elect whether she would rely upon her title to the property under the contract she claimed from the testatrix, or whether she would abandon

Syllabus.

that title and take the devise made for her benefit under the will. She could not take under the will, and at the same time undertake to defeat that provision of the will wherein the property in question was devised to William J. Gorham. She chose to accept under the will, and having done so, she is bound by that provision devising the property in question to William J. Gorham.

The decree of the circuit court will be reversed, and the cause remanded, with directions to dismiss complainant's bill.

Decree reversed.

122	536
123	206
123	536
126	173
122	536
136	379
122	536
155	649
122	536
157	540

CHARLES L. BONNEY

v.

MARY E. STOUGHTON *et al.*

Filed at Ottawa November 11, 1887.

1. **LIMITATION—*as to the matter of accounting.*** An action of account at law, and a bill in equity for an account, must be brought within five years from the time the right of action accrues, which, in the case of a partnership, is upon the dissolution of the same.

2. On May 21, 1879, a partnership between A and B was by mutual consent dissolved, and there was an attempt to settle the partnership account which A believed was settled, showing a balance due him. B died December 18, 1881, and A filed his claim for the sum he insisted was found due him on the alleged settlement. On March 1, 1883, the claim was rejected, on the ground there had not been any adjustment of the partnership account, and this judgment was affirmed by the circuit court on November 2, 1884,—about a year and nine months after A's appeal. On January 20, 1885, he filed his bill against B's personal representative for an accounting, to which the Statute of Limitations was pleaded. No fraud of any kind was practiced on A: *Held*, that the statute was a bar to the relief sought by the bill.

3. **SAME—*of intervening disability.*** When the Statute of Limitations begins to run it will not be arrested by any subsequent disability, unless expressly so provided in the statute. The death of a debtor will not stop the running of the statute.

Brief for the Appellant.

4. **SAME—non-suit—as a suspension of the statute.** The clause of the Limitation law which provides that when, during the pendency of a suit, the statutory period of limitation passes, and the plaintiff is afterward non-suited, he may sue again in one year from the time of such non-suit, has no application to a case where judgment is rendered in bar of the plaintiff's suit, even though he had not pursued his proper remedy in the action.

5. **MISTAKE—proper diligence required.** In the absence of fraud or concealment, before a court of equity will interfere because of the mistake of a party, even as to a matter of fact, the mistake must be such as the exercise of ordinary diligence would not have prevented. If he seeks to be relieved from the effect of his *laches* and neglect to ascertain his rights before the Statute of Limitations has barred him, he should show that his mistake as to his rights and remedy was without negligence on his part.

6. **SAME—mistake as to the law.** While mistake is an independent head of equity jurisdiction, it has been repeatedly held that a mistake or misapprehension of the law will not entitle the party to relief. To this rule there are exceptions, comprising a large class of cases, where a person has acted in respect of his property or estate under a misapprehension of his existing legal right or liability.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. THOMAS A. MORAN, Judge, presiding.

Mr. C. C. BONNEY, for the appellant:

A court of equity will grant relief in case of a misapprehension of a party's rights, when to refuse it would give the other party an unconscionable advantage. 1 Story's Eq. Jur. secs. 138 c, 138 f, 138 g, 138 i; Kerr on Fraud and Mistake, 396, 398, 400; Bispham's Principles of Equity, 240, 243.

In the following cases of mistake it was admitted by the defendant that a certain sum was due the plaintiff, but that relief was barred by limitation. The relief was nevertheless granted. *Chapman v. County Commissioners*, 107 U. S. 348; *Henry County v. Winnebago County*, 52 Ill. 300; *United States v. Thompson*, 98 U. S. 486; *McIntosh v. Saunders*, 68 Ill. 128.

Relief was also granted in the following cases of mistake: *Metcalf v. Williams*, 104 U. S. 95; *Snell v. Insurance Co.* 98

Brief for the Appellees.

id. 90; *Pool v. Docker*, 92 Ill. 509; *McKelway v. Armour*, 2 Stockt. (N. J.) 115; *Beardsley v. Knight*, 4 Vt. 481; 10 id. 190; *Jones v. Munroe*, 32 Ga. 188; *King v. Doolittle*, 1 Head. (Tenn.) 85; *Harrell v. De Normandie*, 24 Tex. 125; *Irick v. Fulton*, 3 Gratt. 196; *Whelen's Appeal*, 70 Pa. St. 425; *Cook v. Sumner County*, 1 Sneed, 716; *Evans v. Strode*, 11 Ohio St. 480; *Harney v. Charles*, 45 Mo. 159.

In cases of mistake the statute dates from the discovery. Story's Eq. (12th ed.) sec. 1521 a; *Brown v. County of Buena Vista*, 95 U. S. 158; *Brookshank v. Smith*, 2 Y. & Coll. 68; *McIntosh v. Saunders*, 68 Ill. 128; *Bond v. Hopkins*, 1 Sch. & Lefroy, 428.

It is inequitable to permit appellee to repudiate the settlement, and to keep the sum she admits to be due on such settlement. *Louisiana v. Wood*, 102 U. S. 295; *Maple v. Kussart*, 52 Pa. St. 352; *Parsley v. Hays*, 17 Iowa, 312; *Deford v. Murcer*, 24 id. 118; *Chilton v. Braidner*, 2 Black, 461; *Greenman v. Greenman*, 107 Ill. 411.

Messrs. PAGE & BOOTH, for the appellees:

A bill in equity for a partnership accounting is within the bar of the Statute of Limitations. *Quayle v. Guild*, 91 Ill. 378; *Hancock v. Harper*, 86 id. 453; *Sloan v. Graham*, 85 id. 30; *Pierce v. McClellan*, 93 id. 246; *Wright v. Le Clair*, 3 Iowa, 221; Story's Eq. Jur. sec. 529; Collyer on Partnership, sec. 374.

No such mistake is alleged as will give the court of equity jurisdiction to take the case out of the statute. Story's Eq. Jur. sec. 151; *Railroad Co. v. Bridges*, 7 B. Mon. 561; *McIntosh v. Saunders*, 68 Ill. 128; *Brookshank v. Smith*, 2 Y. & Coll. 58; *Crane v. Prather*, 4 J. J. Marsh. 76; Story's Eq. Jur. sec. 1521 a.

Mere ignorance of rights, without fraud or misrepresentation of the adverse party, is no bar to the running of the statute, either at law or in equity. *Conner v. Goodman*, 104

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Ill. 365; *Bossard v. White*, 9 Rich. Eq. (S. C.) 499; *Underhill v. Insurance Co.* 67 Ala. 45; *Campbell v. Long*, 20 Iowa, 382; *Reed v. Minell*, 30 Ala. 61; *Bank of Hartford v. Waterman*, 26 Conn. 330.

To avoid the statute it is incumbent upon the complainant to show by his bill, both the existence of such a mistake as will give the court jurisdiction, and also that he could not have discovered the mistake, by the use of reasonable diligence, in time to bring himself within the statute. *Carr v. Hilton*, 1 Curtis, 390; *Farnham v. Brooks*, 9 Pick. 246; *Wood v. Carpenter*, 11 Otto, 143; *Buckner v. Calcote*, 28 Miss. 596; *Stearns v. Page*, 7 How. 829; *Bremond v. McLean*, 45 Tex. 19; *Connolly v. Hammond*, 58 id. 11; *Conner v. Goodman*, 104 Ill. 365.

By prosecuting his claim as a claim for moneys advanced to Crowell individually, in the probate and circuit courts, the appellant's assignee has estopped himself from setting up and claiming that his claim is for an unsettled amount due upon partnership accounting. Bigelow on Estoppel, 578, and cases cited; *Denton v. Irwin*, 5 La. Ann. 18; *Gridley v. Connor*, 4 id. 416; *Sprigg v. Bank of Mt. Pleasant*, 10 Pet. 265; *Newington v. Levy*, Law Rep. (5 C. P.) 607.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

This bill, filed by appellant, Bonney, assignee of Edward G. Bowzer, seeks an accounting in respect to the partnership affairs of the late firm of C. H. Crowell & Co., of which Charles H. Crowell and said Edward G. Bowzer were the co-partners.

It is alleged in the bill, that the co-partnership theretofore existing between Crowell and Bowzer "was terminated and ended by the mutual acts, consent and acquiescence of both parties," on the 21st day of May, 1879. It is also alleged, that there was an attempt at accounting between the co-partners, and that Bowzer, in good faith, believed there was a settlement of the partnership affairs, in which it was agreed there

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was due him from Crowell \$1230.06. There is no allegation in the bill that the co-partnership existed for any purpose after that date, but on the contrary, it is fairly inferable, from the allegations of the bill, that there was a final and complete dissolution of the co-partnership. It is not material that we should now determine whether the balance due Bowzer was agreed upon or not. If it was, there being no extension of time of payment, it became immediately payable; and if not so agreed upon, immediately upon the dissolution of the firm either party might have brought an action against the other partner, and compelled the settlement and adjustment of their partnership affairs. Taking the charge in the bill as true,—that no such settlement or adjustment was, in fact, made,—Bowzer had the right, either by bill in chancery or by action of account, to proceed at once to adjust the partnership affairs between himself and Crowell.

The fifth clause of section 2, chapter 2, of the Revised Statutes, in force July 1, 1874, is: "The action of account may be sustained * * * by one or more co-partner or co-partners, against the other co-partner or co-partners, to settle and adjust their co-partnership accounts and dealings." It is manifest that in either event,—that is, whether there was an adjustment of the account or not,—the right of action in respect to this claim accrued upon dissolution of the co-partnership, May 21, 1879. Upon the dissolution, all that remained to be done, as shown by the bill, was to adjust the account of the partners with each other. Whatever claim either had against the other was a money demand, simply.

Section 15 of the Limitation act, (Starr & Curtis, 1552,) provides: "Actions on unwritten contracts, * * * and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." No limitation is specifically provided for the action of account, and the five years' limitation therefore applies. *Quayle et al. v. Guild, Admr.* 91 Ill. 378.

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This bill was filed January 20, 1885, more than five years after the cause of action accrued, and it is clear that the right of action at law was then barred, and it is, as said by this court in *Hancock v. Harper*, 86 Ill. 445, well settled, that where courts of law and equity have concurrent jurisdiction, a claim barred at law will be barred in equity. Courts of equity, says Justice STORY, (1 Eq. Jur. sec. 529,) govern themselves by the same limitation as to entertaining bills for account, "as are prescribed by the Statute of Limitations, in regard to suits in courts of common law, in matters of account;" and "in so doing they do not act, in cases of this sort, so much upon the ground of analogy to the Statute of Limitations, as positively in obedience to such statute." And this rule obtains on bills for account by one partner against another, as in other cases of bills for account. *Quayle et al. v. Guild, Admr. supra*, and authorities cited.

In the cases cited, of *Hancock v. Harper*, and the later case of *Quayle et al. v. Guild, Admr.*, which was a bill filed for account between partners, and presenting the question now being considered, the authorities are reviewed, and the conclusion there reached disposes of the case at bar, unless some one or more of the matters set up in the bill will stop the running of the statute, or, in equity, should take the case out of its operation. It is insisted, with great earnestness, that the statute should commence only from November 2, 1884, when the circuit court rendered judgment against Bowzer on his appeal from the county court, for the reason that he, for the first time, then discovered and became "convinced" that he was mistaken in supposing that the occurrences of May 21, 1879, between himself and Crowell, were an adjustment of the amount due him; or, at most, could not be held to have commenced to run until March 1, 1883, when the administrator of Crowell repudiated such supposed settlement. It is alleged that Bowzer, in good faith, believed there was an accounting between himself and Crowell, and the balance agreed upon in his favor,

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of \$1230.06, and acted on that belief in presenting his claim in the probate court against the estate of Crowell, and subsequently prosecuting his appeal to the circuit court.

It is apparent from what has preceded, that the statute commenced to run May 21, 1879, during the lifetime of Crowell, who died December 18, 1881,—substantially two years and seven months after the cause of action accrued. Where a statute begins to run, it is not arrested by subsequent disability, unless expressly so provided in the statute. So the death of a party debtor will not stop the running of the Statute of Limitations. *Wood on Limitations*, 10; *Baker v. Brown*, 18 Ill. 91; *The People v. White*, 11 id. 350; *Shelburne, Exr. v. Robinson*, 3 Gilm. 598.

The claim of Bowzer was filed in the probate court August 21, 1882, eight months after Crowell's decease, but was not brought on for hearing in the probate court until March 1, 1883, over six months after its filing. The claim was then rejected by the probate court, and Bowzer appealed to the circuit court, where it was finally heard November 2, 1884, about a year and nine months after the appeal. There is no attempt in the bill to account for these delays, or any of them, nor is it alleged that they were not at Bowzer's instance or occasioned by his act or conduct.

It is to be remembered there is no allegation of misrepresentation, concealment or other fraudulent practices by any one, whereby, or in consequence of which, Bowzer was misled, either as to his rights or the remedy he should pursue to enforce them. All parties, so far as appears, acted in the most perfect good faith, and Bowzer had equal knowledge with Crowell in respect of the partnership affairs and of all that took place at the time of the dissolution of the firm. No act or declaration of Crowell, or any one representing him, is charged to have in any way influenced Bowzer, who knew every fact relating to his claim against Crowell, and, so far as appears, had the necessary evidence to establish it. There is no pre-

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tense that he was mistaken as to any fact, but that he came to a wrong conclusion as to the effect of the acts of himself and Crowell on the 21st of May, 1879.

It is clear that the mistake of Bowzer, if he was mistaken, was purely through his own neglect and inattention to the affairs relating to the partnership. There is no pretense that Bowzer took the usual and ordinary precautions of taking the advice of counsel even, either as to his rights or as to the remedy to be pursued. It may well be, as alleged, that he acted in good faith upon his belief; but good faith alone, without the exercise of reasonable diligence, will not entitle him to relief in a court of equity. It is said that nothing can call forth a court of equity into activity but conscience, good faith and reasonable diligence. In the absence of fraud or concealment, before a court of equity will interfere because of the mistake of a party, even as to a matter of fact, the mistake must be such as the exercise of ordinary diligence would not have prevented.

It may be said that Bowzer was not bound to use greater diligence in prosecuting his claim, for the reason that he had five years within which to have brought his action, and that no laches could be attributed to him during that period. It is undoubtedly true that the statutory period of five years would bar his claim, and he might have filed a bill or brought his action of account at any time within that period; but he is here seeking to remove the disability to the maintenance of his bill created by the bar of the statute. If he had prosecuted his case in the circuit court with reasonable diligence even, after his appeal from the probate court, this question would have been settled long prior to the completion of the bar. It is apparent that the failure of Bowzer to discover his mistakes, both as to his rights and his remedy, is not shown by the bill to have been without negligence on his part. In other words, the bill wholly fails to show that he acted with diligence in his endeavor to ascertain the truth. If he or his assignee, therefore, must suffer, it is because they have not

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made such a case by their bill as will call into activity a court of conscience. *Conner et al. v. Goodman*, 104 Ill. 365.

While mistake is an independent head of equity jurisdiction, it has been repeatedly held that a mistake or misapprehension of the law will not entitle the party to relief in a court of equity. (*Goltra v. Sanasack*, 53 Ill. 456; *Ruffner v. McConnel et al.* 17 id. 213; *Shafer v. Davis*, 13 id. 396; *Sterns v. Page*, 7 How. 829; *Weed v. Weed*, 94 N. Y. 243.) To this general rule there are exceptions, comprising a very large class of cases, where a person has acted in respect of his property or estate under a misapprehension of his existing legal right or liability; but it will be found, upon examination of those cases, that the case here under consideration does not fall within the rule announced. 2 Pomeroy's Eq. 849, and authorities.

It is further argued by counsel for appellant, that his claim is entitled, by analogy, to the benefit of section 25 of the Limitation act, which provides that where, during the pendency of a suit, the statutory period has passed, and the plaintiff is afterward non-suited, one year shall be allowed from the time of such non-suit within which to commence an action. This case comes within no provision of that section. The claimant in the proceeding in the probate court, which was subsequently appealed to the circuit court, was not non-suited, but a judgment was rendered against him in that action. The case was finally tried in the circuit court before a jury, a verdict was rendered in favor of the estate, and judgment was entered upon the verdict. If that court had jurisdiction, and it could be contended that that proceeding was an election of the remedy of Bowzer, equity would not interpose to relieve him from the effect of his choice, and the judgment there rendered would be a bar to his assertion of his claim in another forum. *Penn v. Reynolds*, 23 Gratt. 518; Story's Eq. 1572.

The demurrer to the bill was properly sustained, and the judgment of the Appellate Court will accordingly be affirmed.

Judgment affirmed.

Syllabus. Statement of the case.

SAMUEL C. WILEY

v.

JAMES STEWART.

122 545
34a 173

Filed at Ottawa November 11, 1887.

122 545
108a 151

1. RESCISSION OF CONTRACT—*of a contract made by a mutual agent.* Where a contract is effected through the instrumentality of one who sustains the relation of agent to both the contracting parties, it may, as a general rule, be avoided, at the election of one or both of the parties. Such a contract is not void, but only voidable.

2. SAME—*placing parties in statu quo.* If a party has received anything under a contract which is voidable, he must restore it, if practicable, before he will be permitted to repudiate the agreement.

3. A and B composed a banking firm, and A, B and C composed another firm engaged in business, which was indebted to the bank. A, as a member of the bank firm, loaned \$800 of a depositor's money to the firm of A, B and C, without the knowledge or consent of the depositor, or that of any of his partners. A credited the firm account of A, B and C with the amount, and charged the account of the depositor with the sum so loaned, and executed a note, in the name of the firm of A, B and C, to the depositor, for the same, which he left in a bundle of the depositor's papers. In an action on the note brought by the payee, to whose hands it had come, B denied its execution by verified plea, but no return was made of the depositor's money, which was used in paying the firm debt of A, B and C: *Held*, that B was estopped from repudiating the contract and avoiding the note while taking the benefit of the depositor's money in paying his firm's debts.

4. PARTNERSHIP—*liability for torts of partners.* A partnership firm is liable to others for the tortious acts as well as the contracts of its members within the scope of the partnership.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of La Salle county; the Hon. CHARLES BLANCHARD, Judge, presiding.

In the year 1884, William Wilson, Osman J. Wilson and Samuel C. Wiley were partners in business, under the firm name and style of O. J. Wilson & Co., engaged in blacksmithing and repairing, and making buggies, wagons, harrows and gopher cultivators, at Earlville, Illinois, and William Wilson

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Statement of the case.

and Osman J. Wilson were also partners in business, under the firm name of William Wilson & Co., engaged in banking, at the same place, William Wilson being the general financial manager of both firms. Among the depositors at the bank of William Wilson & Co. was the plaintiff, Stewart, who had for several years been in the habit of depositing his money there, and who had authorized William Wilson to loan his money for him whenever there was a good opportunity to do so. Some time in the year in question William Wilson signed a note, in the firm name of O. J. Wilson & Co., for \$800, and payable to Stewart, and placed it in the bank safe, among a bundle of papers that were marked as belonging to Stewart. He also entered on the account of Stewart, who had the sum of \$984.29 to his credit, a charge of \$800, as having been loaned to O. J. Wilson & Co., and upon the account of O. J. Wilson & Co. a credit of \$800, as being the proceeds of the Stewart loan. These entries, as well as the note, were dated August 1, 1884, but they appear upon the face of the bank books as having been actually entered at a date long subsequent thereto. The signing of this note, and the making of said entries on the bank books, were wholly unknown either to the plaintiff, Stewart, or to the defendant, Wiley, and there is no evidence that the firm of O. J. Wilson & Co. ever received this \$800, excepting the entries above mentioned, made by William Wilson in the bank books, which entries, as before stated, were made without the knowledge of his co-partners, or of Stewart. According to the evidence introduced by the defendant, and the offers of proof made by him, William Wilson had no authority to borrow money or execute promissory notes in the firm name of O. J. Wilson & Co.

On the 19th of December, 1884, the banking firm of William Wilson & Co., being insolvent, made a voluntary assignment, for the benefit of its creditors, to Charles M. Smith, as assignee, and on the 23d day of December, 1884, Samuel C. Wiley filed a bill in chancery in the circuit court of La Salle

Brief for the Appellant.

county, for the dissolution of the firm of O. J. Wilson & Co. and the appointment of a receiver, and on the same day a receiver was appointed by the court. Up to the time of the assignment of William Wilson & Co., and until about ten days thereafter, Stewart had always supposed his money was on deposit in their banking house, and was wholly unaware of the existence of the note until it was shown him by the assignee. The assignee having, some eight weeks afterwards, delivered the note to him, he brought this suit.

To the declaration, the defendant, Samuel C. Wiley, interposed the plea of the general issue, and a plea denying the execution of the note, properly verified by affidavit. William Wilson having fled to parts unknown, was not served with process, and Osman J. Wilson declining to plead, was defaulted. A trial was had, resulting in a verdict and judgment in favor of plaintiff for \$906.66, from which defendant, Wiley, prosecuted an appeal to the Appellate Court for the Second District, which affirmed the judgment. A certificate of importance having been granted, the case is now brought here for review.

Messrs. DUNCAN, O'CONNOR & GILBERT, and Mr. SAMUEL RICHOLSON, for the appellant:

William Wilson could not lawfully act as the agent for both O. J. Wilson & Co. and for Stewart. Ewell's Evans on Agency, 18; *Greenwood v. Spring*, 54 Barb. 375; *Clafin v. Bank*, 25 N. Y. 293; *Florence v. Adams*, 2 Rob. (La.) 556; *Insurance Co. v. Insurance Co.* 14 N. Y. 85; *Copeland v. Insurance Co.* 6 Pick. 198; Story on Agency, sec. 211.

A delivery of the note was absolutely necessary. *Hint v. Weir*, 29 Ill. 84; *Bank v. Strong*, 72 id. 560; *Foy v. Blackstone*, 31 id. 541.

There is no legitimate proof that the firm of O. J. Wilson & Co. received the benefit of the \$800 borrowed of appellee.

Brief for the Appellee. Opinion of the Court.

Messrs. BULL, STRAWN & RUGER, for the appellee:

That the delivery of the note was good, see *Williams v. Galt*, 95 Ill. 172; *Folley v. Van Tuyl*, 9 N. J. L. 153; Daniell on Neg. Inst. sec. 63, pp. 74, 75, 65.

William Wilson was the agent for O. J. Wilson & Co. His loaning to a firm of which he was a member, rendered the contract voidable by Stewart, but not void. Story on Agency, sec. 214; *Greenwood v. Spring*, 54 Barb. 375.

William Wilson could not repudiate his own acts if he desired. *Cotton v. Holliday*, 59 Ill. 176.

When the partnership is proved, and the giving of the note by one of the partners, the presumption is the note was given in the business of the firm. *Littell v. Fitch*, 11 Mich. 524; *Currier v. Cameron*, 31 id. 373.

The firm of O. J. Wilson & Co. having received the benefit of the \$800, and still retaining such benefit, can not avoid payment of the note by repudiating the act of William Wilson.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

The foregoing statement, which was prepared by appellant's counsel, though not quite as full in some respects as it might be, and perhaps slightly colored in others, is nevertheless substantially correct, and sufficiently accurate for the purposes of what we propose to say on the subject. A reference to a few well recognized principles, it is believed, will afford a solution of whatever difficulties, real or imaginary, that are supposed to be in the case before us.

It is undoubtedly true, as claimed by appellant, that where a contract is effected through the instrumentality of one who sustains the relation of agent to both the contracting parties, it may, as a general rule, be avoided, at the election of one or both of the parties. So far there is no conflict of opinion. But is such a contract absolutely void? The logic of appellant's argument seems to maintain that it is; yet upon prin-

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ciples about which there can be no two opinions, it clearly can not be. If in such case the principals, after notice of the agent's true relations to the contracting parties, should either expressly approve the contract, or by a course of conduct treat it as an existing obligation, it would, by all the authorities, become obligatory and binding upon them, to the same extent as if they had originally made it in person. This, of itself, on the universal principle that what is void can not be ratified, demonstrates that such a contract is voidable, only. The case of *Francis v. Kerker*, 85 Ill. 190, is an authority directly in point, wherein such a contract was held to have been ratified by the conduct of the complaining party after notice.

There is also another principle applicable to cases of this kind, where, as in the present instance, the contract has been partly executed, which is not only sustained by the authorities, but is founded alike in reason and in justice. It is, that if a party has received anything under such a contract he must restore it, if practicable, before he will be permitted to repudiate the agreement. *Harding v. Parshall*, 56 Ill. 219; *Buchenau v. Horney*, 12 id. 336; *Staley v. Murphy*, 47 id. 241.

In this case, the money for which the note in question was given was appropriated, whether rightfully or wrongfully, by O. J. Wilson & Co. in the payment of their indebtedness to the bank, and although this was done some six months or more before the commencement of the suit on the note, the appellant does not seem to have interposed any objection to it or made any complaint about it. The answer to this is, that he did not, personally, know anything about it. That does not at all, in our opinion, alter the case. He clearly had constructive notice of the state of the firm's account with the bank, including the \$800 received from appellee, and appellant is therefore to be held to the same degree of responsibility as if he had had personal knowledge of the transaction. There might be special circumstances which would require a change of the rule, as, where the managing partner of a firm has con-

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spired with third parties to perpetrate a fraud upon the other members, who have no personal knowledge of the partnership affairs. But nothing of that kind is pretended here.

If, as appellant seems to claim, the action of Wilson in executing the note to appellee, and appropriating the \$800 to the payment of the firm's indebtedness to the bank, was absolutely void as a contract, what, then, was the legal effect of the transaction? Viewed in that light, it was clearly the simple case of one member of a firm taking the money of a third party and appropriating it to the firm's use,—or, more shortly, it was a tortious conversion by the firm of appellee's money, for which appellant was equally liable with Wilson, on the familiar principle that the firm is liable for the torts as well as the contracts of its members within the scope of the partnership. And in this view of the case the amount thus taken might well have been recovered, under the declaration in this case, as money had and received to the use of the plaintiff. In that view, however, the finding of the jury is perhaps a trifle too large. We do not adopt this theory of the case, however, but have presented it merely to show how little merit there is in the defence, upon appellant's own theory of it.

In view of the fact that appellant has had the full benefit of the money for which the note was given,—at least his firm has, which, in law, amounts to the same thing,—the defence, to say the least of it, strikes one, at first blush, as being decidedly novel. If appellee were trying to collect the money sued for, from the bank, notwithstanding the loan to O. J. Wilson & Co., on the ground that Wilson could not bind appellee while acting for his own firm, there would be much force in the defence. But the present case is wholly unlike the one suggested. Here appellee, who is the only sufferer, takes no exception to Wilson's authority to make the loan to the latter's own firm. On the contrary, he has fully ratified it by bringing suit on the note. But the defendant, whose firm has enjoyed the benefits of the loan, says, by way of defence: "It is

Syllabus.

true, we got the money and paid our debt to the bank with it, but as Wilson had no right to borrow of appellee on the firm's account, because in effecting the loan he acted as the agent of appellee, the loan itself is therefore illegal and void." The law certainly does not sanction such a defence, and we so hold. The appellant not having restored what the firm received under the contract, but having enjoyed the full benefit of the loan, he is estopped from questioning its validity.

We have not thought it necessary to take up and consider separately the points made in appellant's brief. The views here presented are believed to sufficiently answer the substance of the defence, as we understand it, and for a more specific treatment of the questions discussed we refer the parties and counsel to the opinion of the Appellate Court, which has our approval.

The judgment of that court will be affirmed.

Judgment affirmed.

LEWIS MAY, Assignee,

v.

THE FIRST NATIONAL BANK OF ATTLEBORO.

Filed at Ottawa November 11, 1887.

1. **CONFLICT OF LAWS—voluntary assignment for benefit of creditors, made in another State—whether enforceable here.** A voluntary assignment made in another State by a non-resident debtor, executed in conformity with our laws in respect to the conveyance of property, inconsistent, in substantial respects, with our statute relating to assignments, will not be enforced here to the detriment of our citizens; but for all other purposes, if the assignment be valid by the *lex loci*, it will be carried fully into effect. *Rhawn v. Pearce*, 110 Ill. 350, is not in conflict with this rule, as in that case the assignment was by operation of the law of another State, which could not pass property out of its limits.

2. **Non-resident owners are authorized by our laws to make conveyances of land situated in this State, if made pursuant to our law for the making**

122	551
128	227
122	551
130	98
122	551
35a	157
37a	268
122	551
148	362
122	551
151	68
153	640
122	551
54a	495
122	551
184	78
185	462
86a	82
86a	84

Brief for the Appellant.

of such conveyances. Therefore, a voluntary assignment of a non-resident debtor in form sufficient to convey real estate, will be held valid, unless made in contravention of some law or policy of this State.

3. SAME—*preference among creditors—in a foreign voluntary assignment.* The provision in our statute prohibiting all preferences in assignments by debtors, applies only to those made in this State, and not to those made in other States. The statute concerns only domestic assignments and domestic creditors.

4. Non-resident debtors may execute voluntary assignments, with or without preferences, among foreign creditors, as they may see fit, so long as creditors in this State are not injuriously affected thereby.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. JAMES S. NORTON, for the appellant:

Heyer v. Alexander, 108 Ill. 385, was a voluntary assignment by non-residents, of property here, and it was held valid except as against resident creditors. *Rhawn v. Pearce*, 110 Ill. 350, does not overrule the same, so far as it favors citizens of the State. The last case merely decides that an assignment by operation of law in Pennsylvania does not pass property in Illinois, thus making a distinction between a voluntary and statutory assignment. *Dehner v. Rolling Mills*, 7 Bradw. 47.

The prohibition of preferences in the statute is only as to assignments made in this State. (Rev. Stat. chap. 72, sec. 49.) The right to prefer creditors is given by the New York statute, and the same right existed at common law. *Cooper v. McClure*, 16 Ill. 435.

A foreign assignment sufficient to pass real estate in this State will be upheld and enforced except as against the interests of domestic creditors of the assignor. *Chaffee v. Bank*, 71 Me. 514; *Ockerman v. Cross*, 54 N. Y. 29; *Female Academy v. Sullivan*, 116 Ill. 375; *Bentley v. Whittemore*, 19 N. J. 462; *Thurston v. Rosenfeld*, 42 Mo. 474; *Cowell v. Springs Co.* 100 U. S. 55.

Brief for the Appellee. Opinion of the Court.

The "privilege and immunity clause" in the Federal constitution has no application. *Chaffee v. Bank, supra*; *Connor v. Elliott*, 18 How. 591; *McCready v. Virginia*, 94 U. S. 391; *Coryell v. Coryell*, 4 Washb. C. C. 371.

Mr. GEORGE L. THATCHER, for the appellee:

The assignment, with the preferences, made in New York, and relied upon by appellant, is not operative as a conveyance of real estate in this State, as against an attaching creditor, a resident of Massachusetts. *Rhawn v. Pearce*, 110 Ill. 350; *National Bank v. Lacombe*, 84 N. Y. 367; *Brown v. Knox*, 6 Mo. 306; *Upton v. Hubbard*, 28 Conn. 275; *Paine v. Lester*, 44 id. 204; *Warner v. Jaffray*, 96 N. Y. 248; *Kidder v. Tufts*, 48 N. H. 121; *Davis v. Pierce*, 7 Minn. 13; *Jackson v. Butler*, 8 id. 117; *McFarland v. Butler*, id. 116.

It will not be enforced, because it contains preferences. *Bryan v. Brisbin*, 26 Mo. 423; Story on Conflict of Laws, sec. 388.

In the case of *Insurance Co. v. Commercial Bank*, 68 Ill. 348, this court has said: "No doctrine is better settled by authority than that the title to real estate or immovable property can only be affected in the mode recognized by the laws of the State within whose territory it is situated." Story on Conflict of Laws, (8th ed.) 609; *Bethell v. Bethell*, 92 Ind. 310; *Osburn v. Adams*, 18 Pick. 245.

Mr. CHIEF JUSTICE SHELDON delivered the opinion of the Court:

On July 12, 1884, the firm of Halsted, Haines & Co., of New York, made a general assignment to Lewis May, of all partnership and individual property, for the benefit of creditors, providing for certain preferences in case the estate should not be sufficient to pay all creditors in full. On August 22, 1884, the First National Bank of Attleborough, Massachusetts,

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commenced suit, by attachment, against Halsted, Haines & Co., in the Superior Court of Cook county, Illinois, and the writ was levied upon certain real estate in Cook county covered by the deed of assignment. Lewis May, the assignee, interpleaded, setting up the deed of assignment, and alleging the insolvency of the assignors, the proper execution of the deed, that it was made in conformity to the laws of New York, that the deed of assignment was recorded in the recorder's office of Cook county on July 28, 1884, and that the plaintiff in the attachment had actual notice of the deed before the commencement of the suit. A demurrer to the plea was sustained and the plea dismissed. The judgment was affirmed by the Appellate Court for the First District, and the claimant, May, appeals to this court.

The deed of assignment was executed in conformity with the requirements of our law for the conveyance of real estate situated in this State. In *Heyer v. Alexander*, 108 Ill. 385, it was decided that a voluntary assignment by a non-resident, of property in Illinois, for the benefit of his creditors, was not operative to convey the title to the property, as against resident creditors in this State suing by attachment.

The further inquiry for us in this case is, whether such an assignment is valid as against creditors who do not reside in this State, or that of the assignor. *Rhawn v. Pearce*, 110 Ill. 350, was a case where, under a domestic attachment in a court of Pennsylvania, trustees of the estate of the debtor had been appointed by the court, the effect of which, under the statute of that State, was to vest the trustees with all the estate of the debtor. After the time of such vesting of the debtor's estate, creditors of the debtor,—residents of Pennsylvania,—brought an action by attachment against him in this State, and it was decided by this court that such statutory assignment was inoperative as against said creditors attaching effects of the debtor in this State. That case is supposed by appellee's counsel to be an authority in their favor that a voluntary assignment made without the State, of property situated in

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this State, will be held to be invalid, as well against foreign as against domestic creditors attaching the property here. This is a misapprehension of that decision. That case was one of a transfer by mere operation of law, without any conveyance at all by the owner of the property, where the law of Pennsylvania, by whose operation, alone, the property was transferred, could not have any extra-territorial effect, and in such a case as that the assignment was held to be inoperative in this State, alike against our own citizens and the citizens of other States. The distinction between voluntary assignments, and those by operation of law, was clearly taken. In a citation there made, there is language used, which, abstractly taken, might imply that there was no distinction in this respect to be admitted in a court between the citizens of its own State and those of another State. The case in 84 N. Y. 367, from which the citation was made, was one like that of *Rhawn v. Pearce*,—an assignment by operation of law; and as used with reference to such a case, the language was correct, and we adopted and applied it as correct, in reference to such a case, in *Rhawn v. Pearce*. But in the broad extent that in no case should a court hold to a distinction, in pursuing legal remedies, between citizens of its own State and those of another, we are not ready to yield assent thereto. It is not a proposition warranted by the authorities.

Non-resident owners are authorized, by our laws, to make conveyances of land situated in this State, if made pursuant to our law for the making of such conveyances. The assignment in question is a voluntary conveyance, made, in form, pursuant to our statute for the conveyance of real estate. It should then be held valid, unless it was made in contravention of some law or policy of the State. It is claimed the assignment does contravene our statute respecting assignments for the benefit of creditors, in that our statute forbids preferences among creditors, and this assignment makes such preferences. The provision of our statute is: "Every provision in any as-

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signment hereafter made in this State, providing for the payment of one debt or liability in preference to another, shall be void, and all debts and liabilities within the provisions of the assignment shall be paid *pro rata* from the assets thereof." It is thus seen that the provision, in express terms, is limited to assignments made in this State. This assignment was not made in this State, but was made in the State of New York, where such preferences are allowed. Our statute does not apply to an assignment made without the State, and the assignment is not in contravention of the statute.

It is then claimed, that if not against the terms, the assignment is against the policy of the statute. The statute concerns only domestic assignments and domestic creditors. It is a regulation with respect to them alone, and beyond them the policy of the act does not extend. An assignment giving preferences, though made without the State, might, as against creditors residing in this State, with some reason, be claimed to be invalid, as being against the policy of the statute in respect of domestic creditors,—that it was the policy of the law that there should be an equal distribution with respect to them. But as the statute has no application to assignments made without the State, we do not see that there is any policy of the law which can be said to exist with respect to such assignments, or with respect to foreign creditors, and why non-residents are not left free to execute voluntary assignments, with or without preferences, among foreign creditors, as they may see fit, so long as domestic creditors are not affected thereby, without objection lying to such assignments that they are against the policy of our law. The statute was not made for the regulation of foreign assignments, or for the distribution, under such assignments, of a debtor's property among foreign creditors.

A parallel case with the one at bar, is that of *Bentley v. Whittemore*, 19 N. J. Eq. 462,—a case of a voluntary assignment, with preferences among creditors, made in the State

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of New York, and covering land in the State of New Jersey. The law of New Jersey prohibited such preferences; the law of New York allowed them. The court, in the previous case of *Varnum v. Camp*, 1 Green, 326, had held, as we did in *Heyer v. Alexander*, that such an assignment was invalid as against creditors resident in New Jersey; but in the latter case of *Bentley v. Whittmore*, the court sustained such an assignment made in the State of New York against creditors who did not reside in New Jersey, and alike against creditors, citizens of New York and of other States than that of New Jersey. It was held that the New Jersey law applied only to assignments made within that State, and to domestic creditors; and that the enforcement of the assignment, in its application to the citizens of New York or other States, did not in any way contravene any law or policy of the State of New Jersey. The court said: "The true rule of law and public policy is this: that a voluntary assignment made abroad, inconsistent, in substantial respects, with our statute, should not be put in execution here, to the detriment of our citizens, but that for all other purposes, if valid by the *lex loci*, it should be carried fully into effect." To the same effect is *Chafee v. Fourth National Bank*, 71 Me. 514.

The rule held in these cases meets our concurrence, as in accordance with principle and the weight of authority.

The judgment is reversed, and the cause remanded to the Superior Court of Cook county.

Judgment reversed.

Mr. JUSTICE SCOTT, dissenting.

Syllabus. Brief for the Appellants.

CHRISTIAN LUTHER *et al.*

v.

CHARLOTTE LUTHER *et al.**Filed at Ottawa September 26, 1887.*

1. WILLS—probate and contesting of wills—time within which to exhibit a bill to contest. Section 2 of chapter 148 of the Revised Statutes, entitled "Wills" provides for the *ex parte* proof of wills on the testimony of the attesting witnesses, which corresponds with the probate, in England, "in common form," while the subsequent proceeding by bill in equity, under section 7, to contest the validity of the will, is analogous to the probate "in solemn form," by the executor, upon being cited in by the next of kin. Both stages differ from the English probates in extending to the real as well as personal estate.

2. The provision in the statute that if any person interested shall, within three years after the probate of any will, by bill in chancery, contest the validity of the same, etc., is not a limitation law. The filing of the bill within three years is a jurisdictional fact, and is necessary to put the court in motion. The court has no power to entertain such a bill which has been filed after the three years have expired, except in the cases of disability named in the statute.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN C. BAGBY, Judge, presiding.

Mr. MERRITT STARR, and Mr. J. P. W. BROWN, for the appellants:

The statute prescribing the time within which a will may be contested in chancery is a Statute of Limitations.

The heir has always the right to contest the will. He can not be deprived of property or be disinherited without a hearing. Stat. 28 Edw. III, chap. 53; Cooley's Blackstone, (3d ed.) 138, 139, and notes.

This remedy has existed from the beginning of the English law of wills. 1 Williams on Executors, (6th Am. ed.) foot pp. 325, 333, 334; 4 Burn's Ecclesiastical Law, (Philliman's ed.) 316, 318.

Brief for the Appellants.

The following cases, in addition to those above cited, are particularly instructive in showing that the American courts retained the practice of the English court in requiring probate and re-probate in common form and solemn form. *Collier v. Idley*, 1 Bradf. 94; *Campbell v. Logan*, 2 id. 90; *Proctor v. Wanamaker*, 1 Barb. Ch. 302; *Gibson v. Lane*, 9 Yerg. (Tenn.) 475; *Townsend v. Townsend*, 4 Coldw. (Tenn.) 70; *Brown v. Anderson*, 13 Ga. 171; *Kinnard v. Riddlehoover*, 3 Rich. (S. C.) 258; *Noyes v. Barber*, 4 N. H. 406; *George v. George*, 47 id. 44; *Wall v. Wall*, 30 Miss. 91; *Hamberlin v. Terry*, 7 How. (Miss.) 148; *Cowden v. Dobyns*, 5 S. & M. 82; *Martin v. Perkins*, 56 Miss. 204; *Tucker v. Whitehead*, 58 id. 762; *Barksdale v. Hopkins*, 23 Ga. 332; *Walker v. Perrymann*, 23 id. 309; *Hubbard v. Hubbard*, 7 Ore. 42.

The nature of the remedy shows that the statute is a statute of limitations.

The statute has been construed a statute of limitations. *Heirs of Critz v. Pierce*, 106 Ill. 167; *Brown v. Riggan*, 94 id. 560; *Wells' Will*, 5 Litt. 273; *Coalters v. Bryan*, 1 Gratt. 18; *Connolly v. Connolly*, 32 id. 657; *Rogers v. Thomas*, 1 B. Mon. 390; *Bradford v. Andrews*, 20 Ohio St. 208; *Mears v. Mears*, 15 id. 96; *McArthur v. Scott*, 113 U. S. 340; *Noyes v. Barber*, 4 N. H. 406.

The limitation, not being pleaded, is waived. *Brill v. Stiles*, 35 Ill. 305; *Borders v. Murphy*, 78 id. 81; *Trustees v. Wright*, 12 id. 441.

The fraudulent concealment by the defendants, of the complainant's cause of action to contest the alleged will, brings the case within the special statute on fraudulent concealment, viz., Rev. Stat. chap. 83, sec. 22.

The limitation will commence to run only from the time of the discovery of the fraud. *McIntosh v. Saunders*, 68 Ill. 128; *Campbell v. Vining*, 23 id. 525; *Henry County v. Winnebago County*, 52 id. 299.

Brief for the Appellees. Opinion of the Court.

Mr. A. W. Osgood, and Mr. M. F. RIGGLE, for the appellees:

There is no connection between the statute of wills and limitations.

Upon the death of Christian Luther Sr., complainant was placed upon his inquiry as to the manner of the execution of the will, and having slept for a period of ten years, he is barred by his own *laches*. *Farnam v. Brodke*, 9 Pick. 212.

If section 22 of limitations applied to section 7 of wills, then with equal force could it be applied to section 19 of the Chancery Code, a bill of review or writ of error, "because this statute by which parties are brought into court upon constructive notice, though undoubtedly necessary for the administration of justice, may be made the means of perpetrating very great wrong." *Lyon v. Robbins*, 46 Ill. 278.) And yet if any of the parties do not appear within the time therein limited, no matter what injustice may have been perpetrated, they can not allege an excuse for not having acted within the time limited by statute. This probate, like a decree in chancery, can not be annulled, vacated or set aside, except within the time limited by the law.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

Christian Luther Sr., died testate on September 4, 1875, leaving him surviving a widow, the appellee Charlotte Luther, and three children, the appellant Christain Luther, and the appellees John Luther and Sophia Luther, since married to William Nieberg. On September 3, 1875, he made a will, leaving his furniture and personal property to his widow, and also giving her a life estate in all his other property, including lots 4, 5 and 6 of assessor's subdivision of the north-east quarter and part of the north-west quarter of fractional section 5, town 40 north, range 13 east, etc., in Cook county. He devised these lots to John to be taken possession of by him after the widow's death. He gave appellant, Christian Luther, \$50 and Sophia \$1000, these sums to be paid after the widow's

Opinion of the Court.

death, and, if the money should not then be on hand for their payment, they were to be liens on the land until John should pay them.

The will was admitted to probate in the county court of Cook county on September 27, 1875, and letters testamentary were then issued to the appellee Wende, as executor.

This bill was filed in the circuit court of Cook county on September 1, 1885, for the purpose of setting aside the will and the probate thereof on the grounds that the testator was not of sound mind and memory when he made the will, and that he was induced to make it by the fraud, falsehood and misrepresentation of said Wende and of said Charlotte, John and Sophia. The bill alleges that appellants did not learn of the testator's unsoundness of mind and memory, nor of the fraud and undue influence used in obtaining the will, until March, 1884, and that the cause of action set up in the bill was fraudulently concealed by the defendants therein from the complainants until within three years before filing the bill.

The defendants on November 9, 1885, filed an answer denying all the allegations of the bill, but making no reference to the fact of its being filed after the three years prescribed by the statute. Complainants filed a replication to the answer.

The cause came on to be heard; a jury was impaneled to try the issue whether the writing produced was the will of the deceased or not; two witnesses were sworn and testified for defendants; the circuit judge, then having inquired of the solicitor for complainants and being informed by him that complainants did not come within the saving clause of the statute as to infants, *femes covert*, persons absent from the State or *non compos mentis*, dismissed the bill on the ground that, upon the face of it, he had no jurisdiction to try the cause.

It will be noted that the will was admitted to probate on September 27, 1875, and that this bill to contest its validity was not filed until nearly ten years afterwards: to-wit on September 1, 1885.

Opinion of the Court.

The main question presented by the record is, whether a court of chancery in this State can, under our statute, entertain a bill to set aside the probate of a will when more than three years after such probate have elapsed before the bill is filed. The statute is as follows:

"Sec. 7. When any will, testament or codicil shall be exhibited in the county court for probate thereof, as aforesaid, it shall be the duty of the court to receive probate of the same without delay, and to grant letters testamentary thereon to the person or persons entitled, and to do all other needful acts to enable the parties concerned to make settlement of the estate at as early a day as shall be consistent with the rights of the respective persons interested therein: *Provided, however,* that if any person interested shall, within three years after the probate of any such will, testament or codicil, in the county court, as aforesaid, appear, and by his or her bill in chancery contest the validity of the same, an issue at law shall be made up, whether the writing produced be the will of the testator or testatrix or not, which shall be tried by a jury in the circuit court of the county wherein such will, testament or codicil shall have been proven and recorded, as aforesaid, according to the practice in courts of chancery in similar cases; but if no such person shall appear within the time aforesaid, the probate as aforesaid shall be forever binding and conclusive on all the parties concerned, saving to infants, *femes covert*, persons absent from the State, or *non compos mentis*, the like period after the removal of their respective disabilities. And in all such trials by jury, as aforesaid, the certificate of the oath of the witnesses at the time of the first probate shall be admitted as evidence, and to have such weight as the jury shall think it may deserve." Section 7 of "An act in regard to wills," approved March 20, 1872,—Rev. Stat. chap. 148.

The act of January 23, 1829, in force July 1, 1829, (Rev. Laws, 1829, p. 193, sec. 5,) and the act of 1845, (Rev. Stat. 1845, chap. 109, sec. 6, p. 537,) were the same as the act of

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1872, except that, in the former, the period was five years instead of three years. Section 7 is, in substance, a transcript of the 11th and 15th sections of a statute of Kentucky passed February 24, 1797. (*Rigg v. Wilton*, 13 Ill. 15.) The Kentucky statute was taken from the Virginia act of 1785, which was a remodeling of an earlier Virginia act passed in 1748. *Well's Will*, 5 Litt. (Ky.) 273; 12 Hening's Va. Stat. at Large, p. 142; 5 id. pp. 454, 455; 1 Littell's Laws of Ky. p. 611, sec. 293, and note.

The Virginia statute was construed in *Coulter's Exr. et al. v. Bryan et al.* 1 Gratt. 18, and in *Connolly v. Connolly et al.* 32 id. 657. The Kentucky statute was construed in *Rogers v. Thomas*, 1 B. Mon. 390.

In England the probate of wills of personal property was exclusively vested in the ecclesiastical courts. There were two modes of probate one *ex parte*, the other *inter partes*. One was proof of the will "in common form;" the other was proof thereof "in solemn form" or "*per testes*." When a will was proven "in common form," it was taken before the judge of the proper court of probate, and the executor produced witnesses to prove it to be the will of the deceased without citing or giving notice to the parties interested; it was admitted to probate in the absence of such parties. When, however, a will was proven "in solemn form," it was done upon petition of the proponent for a hearing, and all such persons as had an interest, such as the widow, heirs, next of kin, etc., were notified and cited to be present at the probating of the testament; interrogatories were propounded to the witnesses by those producing the will and by the adverse party. The executor of the will, proved "in common form," might, at any time within thirty years, be compelled by a person, having an interest, to prove it *per testes* "in solemn form." 1 Williams on Executors, (6th Am. ed.) foot pp. 325, 333, 334; *Waters v. Stickney*, 12 Allen, 1; *Redmond v. Collins*, 4 Dev. 430; *Etheridge v. Corprew*, 3 Jones, 14.

Opinion of the Court.

But in England there was no court for the probate of wills of realty. The validity of the will was decided incidentally in controversies concerning rights of property claimed under or against it. These controversies were settled in the appropriate jurisdictions. The title of the heir was in its nature legal, and might be asserted in an action of ejectment.

The statute of Virginia, upon which our own and that of Kentucky are based, provided for the probate "in common form" or *ex parte* of wills of both personalty and realty, and also extended the privilege of requiring a re-probate "in solemn form" to wills of realty as well as to those of personalty. Such re-probate was to be asked within seven years, instead of three years as under the Illinois statute. Those to be cited were the persons interested in sustaining rather than those interested in setting aside the will. The contest was to be decided in a court of chancery through the instrumentality of a jury rather than in the original court of probate.

The words in section 7 of our act in regard to wills: "When any will, etc., shall be exhibited in the county court for probate, as *aforesaid*, it shall be the duty of the court to receive probate of the same without delay," refer back to section 2 of that act. (Rev. Stat. chap. 148.) Section 2 provides for the *ex parte* proof of wills on the testimony of the attesting witnesses, which is analogous to the probate in England "in common form." The subsequent proceeding by bill in equity, under section 7, to contest the validity of the will, is analogous to the probate "in solemn form" by the executor upon being cited in by the next of kin. Both stages of the proceedings, however, differ from the former English probates in that they extend to the real estate as well as to the personal property. *McArthur v. Scott*, 113 U. S. 340.

Counsel for appellants claim, that the provision in section 7 for filing the bill within three years is a mere statute of limitations, and that, inasmuch as appellees did not plead the bar of the statute in their answer, they waived it. This position

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is based upon the theory, that the right to contest the validity of the will was not a new right conferred by the statute, but a right, which existed at common law before the statute, and that, therefore, the statute merely limits the time within which such right may be asserted.

Outside of the statute, however, no right existed in favor of the heir to go into a court of chancery to contest the validity of the will. He could not go into equity for any other purpose than to remove impediments to a full and fair trial at law. The power to entertain bills of this character is not embraced among the general equity powers of a court of chancery.

In *Gaines v. Fuentes*, 92 U. S. 10, the Supreme Court of the United States say: "In the case in *Broderick's Will* the doctrine is approved, which is established both in England and in this country that *by the general jurisdiction of courts of equity, independent of statutes, a bill will not lie to set aside a will or its probate*, and whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country, from the full jurisdiction over the subject of wills vested in the probate courts and the revisory power over their adjudications in the appellate courts." (*Broderick's Will*, 21 Wall. 503; *Gaines v. Chew*, 2 How. 619; *Gould v. Gould*, 3 Story, 516; *Tarver v. Tarver*, 9 Pet. 174; *Holden v. Meadows*, 31 Wis. 284; *Archer v. Meadows*, 33 id. 166; 2 Pomeroy's Eq. sec. 913.) Since the decisions of *Kendrick v. Braushy*, 3 Bro. P. C. 358, and *Webb v. Cleverden*, 2 Atk. 424, it has been held in England that equity will not set aside a will for fraud and imposition. The same rule has been generally adopted in the United States. Under the common law system the validity of wills of real estate could only be tested in an action at law; that of wills of personal property was established by the decree of the ecclesiastical court in the proceedings for probate. 2 Pomeroy, 913.

Therefore, as the jurisdiction of courts of chancery in this State to entertain bills to set aside the probate of wills is de-

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rived exclusively from the statute, such jurisdiction can only be exercised in the mode and under the limitations prescribed by the statute. "If any person interested shall, within three years after the probate, etc., appear and by * * * bill in chancery, contest the validity of the" will, "an issue at law shall be made up," etc. If such person does not appear within three years, an issue at law can not be made up. The appearance within three years is a jurisdictional fact, and is necessary in order to put the machinery of the court in motion so as to test the validity of the will. The court has no power to entertain the bill after the three years have passed.

The reason of this is apparent from the words, "if no such person shall appear within the time aforesaid, the probate as aforesaid shall be forever binding and conclusive on all the parties concerned, saving to infants," etc. The original probate of the will upon the testimony of the subscribing witnesses is allowed without delay, in order to secure an orderly settlement of the estate and to prevent the embarrassments and injurious consequences to creditors and others, which might result from the delay incident to a contest over the will. But serious consequences may also result from too long a delay to the property rights and titles of parties interested in and holding under the will, and, therefore, a period should be fixed after which the original probate should be regarded as binding and conclusive.

It is urged however that the jurisdiction of the court of chancery, in this proceeding, is merely that of a court of probate. Its jurisdiction can not be a mere extension and continuation of the "*solemn form*" powers of the probate court so far as the realty is concerned, because at common law the probate court exercised no control either in common or solemn form over real estate, but only over personality. But while the court of chancery is not empowered to give general relief, it may exert its powers to secure the specific relief designed by the statute. Though limited in its functions, it is still a

Syllabus.

court of equity. The proceeding is commenced by bill, framed as any other bill in equity would be framed, except that it is confined to the relief contemplated by the statute, namely, the determination by a jury, on an issue to be directed and tried, of the validity or invalidity of the will. The court, by decree, settles and directs the issue. *Connolly v. Connolly, supra.*

The decree of the circuit court is affirmed.

Decree affirmed.

ALONZO W. ALLEN *et al.*

v.

AMZI F. JACKSON *et al.*

Filed at Ottawa November 11, 1887.

122	567
125	416
122	567
128	186
129	567
156	43
122	567
103	565
122	567
176	484
122	567
208	*535
122	567
214	*189

1. TRUST—arising out of a confidential relation—trustee undertaking to profit thereby. A party may voluntarily assume a confidential relation toward another, and if he does so, he can not thereafter do any act for his own gain at the expense of such relation.

2. So when a person obtains the legal title to property by virtue of a confidential relation and influence, under such circumstances that he ought not, according to the rules of equity and good conscience, to hold and enjoy the beneficial interests of the property, a court of equity, in order to administer complete justice between the parties, will raise a trust by construction, and fasten it upon his conscience, and convert him into a trustee of the legal title, and order him to hold it, or to execute the trust in such manner as to protect the rights of the real party in interest.

3. A corporation acquired a tract of land subject to an incumbrance thereon, which it was to discharge, and laid the same out into lots, which it sold, making warranty deeds therefor. On bill to enforce the incumbrance, the lot owners applied to one who was a director and president of the corporation, and asked him if the company would protect them, and what steps they should take, and he assured them that the company would protect their rights, and directed them to pay no attention to the suit. Relying on this assurance, no defence was made and no steps taken to pay off the incumbrance, and the property was sold, and such officer acquired the legal title to the lots, and claimed the same adversely to the rights of the prior purchasers thereof: Held, that by directing such purchasers to make no defence, but to trust to the company, such officer voluntarily assumed a con-

Brief for the Plaintiffs in Error.

fidential relation, and incapacitated himself from becoming the purchaser of the lots at the foreclosure sale to the detriment of the prior purchasers from the company, and that he took the property in the same situation it was when he assured the lot purchasers that their rights should be protected.

4. PURCHASERS—*subject to incumbrance—in case of sales in parcels where incumbrance is on an entire tract—marshaling assets.* A land company bought a tract of land, the purchase money of which was unpaid by its grantor, and which was an incumbrance to be paid by the company. The company laid the land out in lots, many of which it sold, and conveyed by warranty deeds. The original purchase money not being paid, a bill was filed by the holder of the incumbrance to have the property sold: *Held,* that the purchasers of the lots were entitled to have an account taken of all that had been paid, and for the payment of the balance to have the unsold lots of the company first sold, and should there still remain a balance due, to have the other lots sold in the inverse order of their alienation.

WRIT OF ERROR to the Circuit Court of La Salle county; the Hon. GEORGE W. STIPP, Judge, presiding.

Messrs. BULL, STRAWN & RUGER, for the plaintiffs in error:

In equity, the summary remedy for fraud is to convert the wrongdoer into a trustee and the one wronged into a *cestui que trust*, and then enforce the execution of the trust. *Tiffany & Bullard on Trusts*, 113, 115, 120.

But, independent of this, Jackson stood as the trustee of the creditors of the company. The directors are the primary agents of the corporation, and the relation of trustee and *cestui que trust* exists between them and creditors, and the fiduciary character of this relation requires of them the highest and most scrupulous good faith in their transactions for the corporation and creditors. *Field on Corporations*, 172, 397, 403; *Jackson v. Ludeling*, 21 Wall. 616; *Railroad Co. v. Kelley*, 77 Ill. 426; *Thompson on Liability of Officers and Agents of Corporations*, 395, *et seq.*; *Bank of St. Marys v. St. John*, 25 Ala. 566.

Jackson was president of the company at the time he purchased this property, for the corporation still existed, notwithstanding the appointment of a receiver. (*People v. Barnett*, 91 Ill. 422.) And the rule is universal that no person shall be permitted to purchase an interest in property when he has a

Brief for the Plaintiffs in Error.

duty to perform, inconsistent with his character of purchaser on his own account. 1 Washburn on Real Prop. (2d ed.) *430; Tiffany & Bullard on Trusts, 152, 148, 149; Story's Eq. Jur. secs. 323, 328, 322; *Britton v. Handy*, 20 Ark. 381; *Torrey v. Bank of Orleans*, 9 Paige, 648; *Van Epp v. Van Epp*, id. 237; *Railroad Co. v. Kelley*, 77 Ill. 426; *Davis v. Hamlin*, 108 id. 39; 1 Leading Cas. in Eq. 62, note to *Keech v. Sandford*; *Railway Co. v. Poor*, 59 Me. 277; Thompson on Liability of Officers and Agents of Corporations, chap. 3, notes, sec. 8, p. 360.

Even if Jackson had not been connected with the company, making the statements he did with a view of obtaining the title thereby, would, in equity, render him a trustee. *Beach v. Dyer*, 93 Ill. 295; Perry on Trusts, sec. 166; 1 Story's Eq. Jur. (8th ed.) sec. 256; *Doyle v. Wiley*, 15 Ill. 576; *Trotter v. Smith*, 59 id. 240.

If a grantee obtains a deed by means of promises to hold the land for another, this is sufficient to raise a trust in favor of the latter, on the ground of fraud, and this may be proved by parol. 2 Washburn on Real Prop. (3d ed.) 451; *Dennis v. McCagg*, 32 Ill. 429; *Morgan v. Clayton*, 61 id. 35; *Strong v. Shea*, 83 id. 575; *Switzer v. Skiles*, 3 Gilm. 529; *Wright v. Gay*, 101 Ill. 233; *Brophy v. Lawler*, 107 id. 284; *Roller v. Spillman*, 13 Wis. 33.

Jackson can not excuse himself by saying his statements were the act of the company, for then equity would say: Your purchase was also the act of the company, to which you must look for reimbursement. But agency will not excuse a personal liability for fraud. Story on Agency, sec. 311; *Campbell v. Hillman*, 15 B. Mon. 508; *Allen v. Hartfield*, 76 Ill. 358; *Peck v. Cooper*, 112 id. 192.

Courts of equity will apply the same rule. *Reed v. Peterson*, 95 Ill. 288; *Ackerman v. Halsey*, 37 N. J. Eq. 356; *Arnot v. Biscoe*, 1 Ves. Sr. 95; *Seddon v. Connell*, 10 Sim. 86; Thompson on Liability of Officers and Agents of Corporations, chap. 3, notes, secs. 4, 21, p. 355.

Opinion of the Court.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

We have not had the benefit of any argument, in the present case, on behalf of the defendants in error, and we may, therefore, have misapprehended some of the facts; but as we have been able to gather them from the abstract and argument of plaintiffs in error, they are, so far as important to any question to be considered by us, in brief, as follows:

The Woodruff heirs owned a tract of land adjoining, or at least in the near vicinity of, the town of Marseilles, in La Salle county, which they contracted to sell and convey, for a consideration to be thereafter paid, to Roderick Clark. Clark was one of the organizers and incorporators of "The Marseilles Land and Water Power Company," and on the 2d of April, A. D. 1867, he conveyed the tract to that company. In June of that year the company caused the tract to be laid off into lots, and platted, and in that and the next succeeding year the complainants became the owners of certain of these lots through purchases from the company for valuable considerations paid, and title was conveyed to them by warranty deeds of the company. The payments not having been made to the Woodruff heirs for the tract of land, as provided for by their contract with Clark, on the 3d of October, A. D. 1878, they filed their bill in chancery in the circuit court of La Salle county, against the Marseilles Land and Water Power Company and the complainants and others, praying that it be decreed that the amount due on the contract with Clark be paid within a day to be named, and that in default, the company's rights thereunder be terminated, and the parties in possession surrender that possession. Decree was rendered on the 10th of January, A. D. 1881, in conformity with the prayer of the bill; and the amount due not being paid, as provided by the decree, on the 18th of January, A. D. 1881, it was finally decreed that complainants in the present suit surrender possession, etc.

Amzi F. Jackson was a director in the Marseilles Land and Water Power Company from 1875, and the president of that

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company from April, 1880. While acting as director and president of the company, and after the complainants in the present suit had been served with summons in the suit by the Woodruff heirs, against them and the Marseilles Land and Water Power Company, they applied to him to know, in substance and effect, whether the company would protect them in that suit, and what steps they should take to protect their rights to the property they respectively held under their several warranty deeds from that company, and they were assured by him that the company would protect their rights, and that they should pay no attention to the suit. Relying on this assurance, complainants made no defence to that suit, and made no effort to pay the money found due by the decree. A portion of the Woodruff heirs conveyed their interest in the tract to Eames, on the 23d of December, A. D. 1880, and on the 29th of October, A. D. 1881, Eames and the remaining Woodruff heirs sold and conveyed to Jackson. A receiver of the Marseilles Land and Water Power Company was appointed on the 30th of December, A. D. 1880. The present bill was filed on the 29th of September, A. D. 1882, and summons was issued and served the same day, and on the 3d of November, A. D. 1882, Amzi F. Jackson conveyed to Hiram Jackson. The court below, on hearing, decreed that the bill be dismissed.

A party may voluntarily assume a confidential relation towards another, and if he shall do so, he can not thereafter do any act for his own gain at the expense of that relation. Kerr on Fraud and Mistake, (Bump's ed.) 151, 179; *Reed et al. v. Peterson*, 91 Ill. 295. Where "a person obtains the legal title to property by virtue of a confidential relation and influence, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interests of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust, by construction, out of such circumstances or relations, and this trust they will fasten

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upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it, or to execute the trust in such manner as to protect the rights of the defrauded party, and promote the safety and interests of society." Perry on Trusts, (1st ed.) 166. See, also, Kerr on Fraud and Mistake, (Bump's ed.) 150; *Beach et al. v. Dyer et al.* 93 Ill. 295; *Doyle v. Wiley*, 15 id. 576; *Trotter v. Smith et al.* 59 id. 240; Tiffany & Bullard on Trusts, 113, 115, 120.

It was the duty of the Marseilles Land and Water Power Company to protect the interests of the complainants, because it had so covenanted. The position of Jackson was such that he could have known, and it was his duty to know, whether the company was able to do so or not. The complainants were therefore authorized to believe and rely upon his representations in that regard. By directing them to make no defence, but to trust to the company, he voluntarily assumed a confidential relation; and it would seem to be a palpable violation of the principles of natural justice, that he, having induced inaction on their part until it was too late to preserve their rights, should be allowed to then become, himself, the purchaser of the property. It is equitable that as respects their rights, the title to the property should be held to be in precisely the same situation that it was when he assured the complainants that their rights should be protected. What rights they then had they now have. They then would have been entitled to have had an account of all that had been paid, and that in selling the property for the payment of the balance due, that part then unsold by the company should be first sold, and should there still remain a balance, the lots should be sold for its payment in the inverse order of their alienation, as in the case of successive sales of lands mortgaged when foreclosure is decreed. *Iglehart et al. v. Crane et al.* 42 Ill. 261.

The decree is reversed, and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

Syllabus. Brief for the Appellants.

C. H. McCORMICK, Jr. *et al.*129 573
188 581

v.

AUGUSTUS BAUER *et al.*122 573
188 581*Filed at Ottawa November 11, 1887.*

1. **STARE DECISIS**—*as to decisions in the Supreme Court.* The decision of a question by this court, when involved in a subsequent case in which the parties are not identical with those in the former case, can not be treated as *res judicata*; yet, on the principle of *stare decisis*, the holding is just as binding on this court as any of its decisions, and will govern it, unless some imperative reason appears for departing from it.

2. **PRIOR AND JUNIOR INCUMBRANCERS**—*adjustment of equities between them—and when priority of right is lost.* A junior incumbrancer, acting in his own interest, and to accomplish a purpose of his own by doing something to make his own security available,—as, in defeating the lien of a prior deed of trust on the same property,—will not thereby be entitled to any superior equity over another incumbrancer whose lien was subject to that so defeated, but prior to the contesting creditor, or be entitled to be reimbursed for the expenses in defeating the first lien, when the intervening creditor, who is thereby benefited, has not requested or induced the junior creditor to do so. If the latter had discharged the prior lien by payment, in order to save himself, a different rule would apply.

3. Where a mortgagee transfers the notes secured, and makes a written assignment of the mortgage, which assignment is not recorded until after the mortgagor makes a conveyance of the mortgaged premises to the mortgagee, and the latter executes another mortgage of the same, which deed and subsequent mortgage are first recorded, the last mortgage will take precedence of the first; but another mortgage or deed of trust executed by him after the recording of the assignment of the first mortgage, will be subject thereto.

4. **ATTACKING JUDGMENT COLLATERALLY**—*for mere error.* A judgment foreclosing a mortgage by *scire facias*, and the sale of the mortgaged premises thereunder, can not be defeated by errors and irregularities in the proceeding not affecting the jurisdiction of the court.

Appeal from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

Mr. W. T. BURGESS, for the appellants:

The sale under the judgment of foreclosure by *scire facias* was void, for the reasons, first, the description of the land is

Brief for the Appellants.

uncertain on its face; second, when applied to the subject matter, is uncertain; and third, the land was sold subject to an incumbrance, when none existed.

As to the description being void for uncertainty, see *Jackson v. Rosevette*, 13 Johns. 102; *Jackson v. Striker*, 1 Johns. Cas. 284; *Tallman v. White*, 2 Com. 72; *Mason v. White*, 11 Barb. 185; *Peck v. Mallams*, 10 N. Y. 530; *Haren v. Cram*, 1 N. H. 94; *Marmaduke v. Tenant*, 4 B. Mon. 210; *Fenwick v. Floyd*, 1 H. & G. 000; *Thomas v. Turvey*, id. 435; *Stout v. Cook*, 37 Ill. 283; *Hughes v. Streater*, 24 id. 650; *Shackelford v. Bailey*, 35 id. 391; *Laflin v. Harrington*, 16 id. 304.

The sale subject to incumbrances, when none existed, was void. *Bullard v. Hinckly*, 9 Greenl. 289; *Dougherty v. Linthicum*, 8 Dana, 194.

Messrs. JENKINS & HARKNESS, for the appellant McCormick:

For contesting the first decree of the court, securing the reversal thereof, and a final reduction of the debt of Greenbaum & Foreman from \$201,657.70 to \$64,893.13, appellants, who were the real active parties to such contest, are entitled to the benefits resulting from such prior incumbrance. *Harper v. Ely*, 70 Ill. 581; *Arnold v. Foot*, 7 B. Mon. 66; *McCormick v. Knox*, 15 Otto, 122.

Appellants are entitled to hold lots 9 to 14 as the fruits of their diligence and activity in removing the prior incumbrance of Greenbaum & Foreman, upon the principle that the diligent creditor is entitled to the fruits of his diligence. *Whalen v. Bishop*, 58 Ill. 162; *Lyon v. Robbins*, 46 id. 276; *McNary v. Southworth*, 58 id. 473; *Smith v. Lind*, 29 id. 24; *McDermott v. Strong*, 4 Johns. 687; *Miller v. Sherry*, 2 Wall. 237; *Gordon v. Lowell*, 21 Maine, 251; *Coring v. White*, 2 Paige, 567; *Hayden v. Bucklin*, 9 id. 512; *Edmiston v. Hyde*, 1 id. 637; *International Bank v. Rappleye*, 93 Ill. 396.

When a prior lien has been removed by a junior lien holder, he is always protected as against an intervening incumbrance.

Brief for the Appellees.

Young v. Morgan, 89 Ill. 199; *Redmond v. Burroughs*, 63 N. C. 242; *Page v. Foeter*, 7 N. H. 392; *Arnold v. Foot*, 7 B. Mon. 66; *Cottrell's Appeal*, 23 Pa. St. 294; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Tyrrell v. Ward*, 102 Ill. 29.

When a son having a prior mortgage, voluntarily and without payment released it to his mother, who owned the lot, it was held that such release was for her benefit only, and not for that of a junior mortgagee. *Spaulding v. Crane*, 46 Vt. 292.

The debt may be paid and extinguished, but the lien of it will not be thereby discharged, if to protect the equities of all parties the lien should be kept alive. *Flagg v. Geltmacher*, 98 Ill. 293; *Shaver v. Williams*, 87 id. 469.

The *scire facias* proceedings were ineffectual to confer title upon appellees, because the sale was made under a second *pluries* special writ of *fieri facias*, which was issued without authority of law.

The *scire facias* foreclosure was ineffectual to confer title upon appellees, because the property sold was not that described in the mortgage. *Marshall v. Maury*, 1 Scam. 231; *Russell v. Brown*, 41 Ill. 143.

Messrs. SMITH & PENCE, for the appellees:

The indebtedness secured to Greenbaum & Foreman under Rogers' trust deed having been paid before sale of the premises conveyed thereby under Greenbaum decree, the Honore mortgage, under which appellees claim title, became the first lien.

All persons taking the Walker title after the record of the assignment of the Honore mortgage to Wilshire, after November 19, 1872, took subject to that mortgage. *International Bank v. Wilshire*, 108 Ill. 143.

The doctrine of superior diligence only applies to the pursuit and subjection of equitable assets,—that is, assets upon which there is no legal claim, and which can only be reached through the aid of the chancellor. *Silk v. Prime*, 2 Lead. Cas. in Eq. (Am. notes,) 381, 388, 389, 390; 1 Story's Eq. Jur. sec. 553;

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Atlas Bank v. Nahant Bank, 3 Metc. 581; *Purdy v. Doyle*, 1 Paige, 559; *Codwise v. Getston*, 10 Johns. 522.

The sheriff's sale under the judgment in *Wilshire v. Honore* is not void for irregularity or uncertainty of description. Judgment does not become dormant for seven years. The *Wilshire v. Honore* mortgage was not barred by limitation.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

Augustus Bauer, on the 22d day of January, 1886, exhibited his bill in the circuit court of Cook county, against the appellants, Cyrus H. McCormick, Jr., and others, praying for the partition of certain real estate, being all, or some portions of, lots 9, 10, 11, 12, 13 and 14, block 10, in Samuel J. Walker's dock addition to Chicago, and described in the bill as follows: "Beginning at the north-east corner of said lot 9, running thence south, on the east line of said lots, 440 feet, to a point 40 feet south of the north-east corner of said lot 13; thence south-westerly 266 feet, more or less, to a point on the west line of said lot 14, 72 feet south of the north-west corner thereof; thence north on the west line of said lots 9, 10, 11, 12, 13 and 14, 572 feet, more or less, to the north-west corner of said lot 9; thence east on the north line of said lot 9, 240 feet, to the place of beginning."

It is averred in the bill, that the complainant, and defendants C. Edward Schoellkopf, International Bank of Chicago and Berthold Loewenthal, are, respectively, seized in fee of an undivided equitable estate in said premises, in the following proportions,—that is to say, that complainant is entitled to $\frac{1807}{10000}$ parts thereof, Schoellkopf to $\frac{1800}{10000}$ parts, International Bank to $\frac{4817}{10000}$ parts, and Loewenthal to $\frac{1578}{10000}$ parts; that said Loewenthal holds the legal title to the whole of said premises, for the use of himself and co-tenants, in the proportions stated. It is further charged in the bill, that the defendants McCormick, the Third National Bank of Chicago, Huntington W.

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Jackson, Alpheus C. Badger, and others, by virtue of certain deeds and legal proceedings particularly set forth in the bill, claim to have some interest in the premises, which deeds, etc., complainant asks to have set aside as a cloud upon the title of himself and co-tenants. Defendants Loewenthal, Schoellkopf and the International Bank answered, admitting the averments in the bill, and also filed a cross-bill, setting up the same facts charged in the original bill, and asking like relief. The other defendants answered, denying the equities of the bill and cross-bill, and setting up various matters not important to be particularly noted in the view we take of the case. The cause was heard upon the pleadings and proofs, resulting in a decree in conformity with the prayer of the bill and cross-bill. From that decree this appeal is prosecuted.

It appears from the record that Samuel J. Walker, being the owner in fee of blocks 1, 2, 20, 21, 22, 23 and 24, Canal-port addition to Chicago, by warranty deed, bearing date October 29, 1865, conveyed the same to Henry H. Honore; that the latter thereupon executed to Walker a mortgage upon the purchased premises, to secure Honore's notes to Walker, for the sum of \$36,000, payable in one and two years, with interest at eight per cent per annum. The deed and mortgage were both recorded December 30, 1865. These notes were negotiated by Walker to Wilshire & Co. before maturity, in due course of business, and for a valuable consideration. Walker also made a written assignment of the mortgage. This transaction is claimed by appellees to have taken place in 1866, though the assignment of the mortgage was not placed on record till the 19th of November, 1872. A judgment of foreclosure of this mortgage was obtained, in a proceeding by *scire facias*, on the 3d of September, 1877. On the 14th of August, 1884, the mortgaged premises were sold by the sheriff to the International Bank, under a *pluries* special execution issued upon said judgment, for \$73,095.54, the amount of the judgment. The International Bank assigned the certificate of

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purchase to Loewenthal, who, on the 18th of November, 1885, received a sheriff's deed for the property in question. The appellees claim through this deed. It appears, however, that before the recording of the assignment of the Honore-Wilshire mortgage,—to-wit, on the 25th of January, 1871,—Honore, by quitclaim deed, reconveyed the premises, by the same description, to Walker. This deed was recorded on the 25th of March following. On the application of Walker, the city council of the city of Chicago, on the 12th of May, 1871, passed an ordinance vacating the said Canalport addition to the city, and Walker, in pursuance of the vacating ordinance, made a new subdivision of the whole tract, called Walker's dock addition, above referred to, the plat whereof was recorded November 18, 1871. It is claimed by appellees,—and we think the evidence sustains the claim,—that blocks 20, 21, 22 and 23, Canalport addition, including one-half of the abutting streets, are embraced within lots 9, 10, 11, 12, 13 and 14, block 10, Walker's dock addition.

On the 20th of March, 1872, Samuel J. Walker executed to John G. Rogers a trust deed upon the premises in question, by the description last mentioned, which was recorded on the following day, to secure an accommodation note of H. H. Walker, for \$30,000. This note and trust deed, upon their execution, were negotiated and delivered by Samuel J. Walker to Greenbaum & Foreman, as collateral security for certain indebtedness due from him to them. On May 7, 1873, S. J. Walker executed to A. D. Rich another trust deed upon lots 11 to 20, being part of the same premises, to secure certain indebtedness from Walker to the Union Trust Company. On January 21, 1874, Walker, by quitclaim deed, conveyed the property to J. Irving Pearce. This conveyance, though absolute in form, was, in fact, as is conceded, a mortgage to secure indebtedness from Walker to the Third National Bank. Pearce, on the 1st of August, 1874, with the concurrence of Walker and the bank, conveyed said lots, from 9 to 14, in-

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clusive, to Alpheus C. Badger, in trust that he would execute certain trust deeds upon the premises, to secure Walker's said indebtedness to the bank, and also certain other claims held against him by A. D. Hunt and others. These trust deeds were accordingly executed by Badger.

Appellants claim, under the foregoing conveyances, and certain legal proceedings based thereon, not only superior equities to the appellees, but also the better legal title. We do not think this claim is well founded in either respect. As we understand the case, this court has already substantially passed upon the controlling questions in it. It is true, the parties to the litigation in which these questions arose, were not precisely the same as those now before the court, and, consequently, their determination can not be treated as *res judicata* between the present parties. Yet, on the principle of *stare decisis*, they are just as binding upon this court as any of its decisions, and they must control, unless some imperative reason is perceived for departing from them. As already seen, the Honore mortgage was foreclosed by *scire facias*, in September, 1877, and this court, on the appeal of Honore, at its January term, 1884, affirmed the judgment, thus establishing its validity and conclusiveness between the parties to it. *Honore v. Wilshire*, 109 Ill. 103.

On the 24th of February, 1874, Samuel J. Walker filed a bill in the circuit court of Cook county, to enjoin Rich from selling under the trust deed made to him to secure Walker's indebtedness to the Union Trust Company. The trust company answered, and also filed a cross-bill, making Greenbaum & Foreman, and others, defendants. Greenbaum & Foreman, the Union Trust Company, and the Third National Bank and Hunt, filed cross-bills, impleading Walker and each other, and praying a foreclosure of the trust deeds to Rogers, Rich and Pearce, under which they respectively claimed. Walker, the Union Trust Company and the Third National Bank contested the claim of Greenbaum & Foreman, on the ground of usury,

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and insisted that they had sufficient collaterals in their hands to satisfy and discharge all that was due them from Walker, secured by the Rogers trust deed, and asked that these collaterals should be first exhausted before the sale of any of the lots. The defence thus made against the Greenbaum & Foreman claim, under the Rogers trust deed, was ultimately successful. The court, upon the first hearing, overruled the defence of usury, and, by its decree, fixed the amount of Walker's indebtedness to Greenbaum & Foreman at \$201,657.70. The decree in the case was subsequently reversed, on the ground that the court erred in overruling the defence of usury. This defence being successfully interposed on the second hearing, the amount of the first decree was reduced to \$64,893.19, which sum was wholly paid out of the proceeds of the collaterals in Greenbaum & Foreman's hands, belonging to Walker, and the lots in question were sold under the decree, to satisfy the indebtedness of those claiming under the Rich and Pearce trust deeds. By an arrangement between the beneficiaries under these deeds, the property was bid off by McCormick. The contention of appellants now is, that by their superior diligence, and the expenditure of large sums of money in contesting the claim of Greenbaum & Foreman, they succeeded in greatly reducing the amount, and in defeating it altogether so far as the lots are concerned, and that because of this, they are, upon some principle of equity not very clearly defined, entitled to be reimbursed for such expenditures, and compensated for their superior diligence, out of these lots. We are aware of no legal principle upon which this contention can be sustained.

It is not claimed or pretended that this litigation was instituted, or that the expenses thereof were incurred, at the instance of appellees, or either of them. Nor is there any ground for the claim that appellants have, with their own means, discharged any lien or incumbrance upon the lots which stood in the way of appellees' title; and, as already seen, no part of

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the proceeds of the lots was applied to the payment of Greenbaum & Foreman's claim, which was the only one of all of them that affected appellees' title, and it had become an incumbrance on the property, as already seen, by reason of Wilshire's neglecting to have the assignment of the Honore mortgage recorded until after the execution and recording of the Rogers trust deed. The other trust deeds were all executed after the assignment was recorded, hence, all claiming under them are chargeable with notice of the rights of Wilshire and his assignees. *International Bank et al. v. Wilshire*, 108 Ill. 143.

Had appellants, with their own means, discharged the Rogers trust deed, or any part of it, they would clearly have been entitled to be subrogated to the rights of Greenbaum & Foreman, and to the amount of such payment the appellants would have had an equitable lien upon the property. But no such a case is presented by this record. The one before us is, shortly, this: Four incumbrances were placed by Walker upon the lots in question, in the following order, namely, the Honore mortgage, the Rogers, Rich and Pearce trust deeds. By the *laches* of Wilshire, as already shown, the Honore mortgage became subordinated to the Rogers trust deed, so that the latter became the first instead of the second in the series of securities. Wilshire's loss of priority in neglecting to have the assignment of the Honore mortgage recorded, was a matter of no consequence to appellants, as that occurred before their title accrued, and even if it had not occurred at all, both of those incumbrances would have stood, as they do now, in the way of the Rich and Pearce trust deeds, through which appellants claim. While such were the relations of the parties with respect to the property, the appellants, by their respective cross-bills, sought to enforce their junior liens against the lots. To do this effectually, they were bound to either pay or in some manner defeat the Rogers trust deed and Honore mortgage, both of which stood in their way. This, as we have already seen, they attempted to do, and successfully, too, so far as the

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Rogers trust deed or the first lien is concerned. But strange to say, no attempt seems to have been made to get rid of the Honore mortgage, or to have settled the rights of those claiming under it. And now because, while appellants, acting in their own interest, and to accomplish a purpose of their own by doing something they were compelled to do in order to make the trust deeds under which they claim available, they have incidentally benefited appellees, it is insisted that the latter shall lose their interest in the property altogether, or at least shall reimburse appellants the expenses of the litigation. Such a position as this certainly finds no sanction in the law. The result of the litigation, it will be noted, shows that, as against the lots, (the only thing here in dispute,) the claim of Greenbaum & Foreman was an invalid one; that they had funds in their hands belonging to Walker sufficient to pay, and which did pay, all that was justly due under the Rogers trust deed. Had appellees been brought into court, as they should have been, they would have had the same right that appellants had to have the collaterals in Greenbaum & Foreman's hands applied, as they were applied, to the discharge of their claim, without resorting to the lots; but as they were not made parties to that litigation, it was sufficient for them to exercise this right when Greenbaum & Foreman undertook to enforce their claim upon the lots, as against appellees. We regard the present situation of the parties with respect to the property, the same as if Walker, pending the suit, had voluntarily paid the Greenbaum & Foreman claim out of his own pocket. The effect in that case would have been simply to extinguish the first lien upon the property, without at all affecting the priorities or equities between the other lien holders.

This view of the matter substantially disposes of the case adversely to appellants. It would therefore be an unprofitable consumption of time and fruitless labor to enter upon an examination of the remaining subordinate questions discussed in the briefs.

Syllabus.

A number of objections are urged against the judgment of foreclosure of the Honore mortgage, and the subsequent proceedings thereunder. While it may be admitted these objections are not groundless, yet we do not think any of the errors and irregularities complained of are of so serious a character as to justify us in holding the whole proceeding void in a collateral proceeding, as this is. Such of the objections as go to the jurisdiction of the court in that proceeding we think are not well founded, and it is clear mere errors and irregularities can be of no avail here. The claim that appellees are barred by the Statute of Limitations we regard as equally untenable.

Without going into further detail, we think, upon the whole case, the decree below is right, and it will therefore be affirmed.

Decree affirmed.

Mr. JUSTICE MAGRUDER took no part in the decision of this case.

EDWIN D. TUCKER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa November 11, 1887.

1. MARRIAGE LICENSE—*as to the capacity in which the clerk may sign it.* As the county clerk is also the clerk of the county court, the fact that the county clerk signs the marriage license as clerk of the county court, will not affect its validity.

2. CRIMINAL LAW—bigamy—*proof of a former marriage, of the mode.* On a prosecution for bigamy, letters of the defendant written to his former wife while they were living together as husband and wife, showing that they were living together as such, and that she was acknowledged by him as his wife, are admissible in evidence to show the fact of the prior marriage.

3. The statute relating to bigamy provides that it shall not be necessary to prove either marriage by the register or certificate thereof, or other record evidence, but the same may be proved by such other evidence as is admissible to prove a marriage in other cases. So it is competent to show the

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Syllabus.

conversation and letters of the parties addressing each other as husband and wife, and the marriage may be shown by a certified copy from the records of the county clerk of the certificate of the person who performed the marriage ceremony, indorsed on the license.

4. **SAME—record evidence in criminal cases—right of accused to meet the witnesses face to face.** The constitutional provision that "in all criminal prosecutions the accused shall have the right to meet the witnesses face to face," has no reference to record evidence which may, during the progress of a criminal trial, become necessary to establish some material fact to secure a conviction. A record imports verity, and a cross-examination is foreign to and has no application to record evidence.

5. **VARIANCE—middle initial in a name.** An indictment for bigamy charged that the defendant was lawfully married to Mary I. Bennett, while the proof showed a marriage to Mary Bennett: *Held*, no variance, as the letter "I" was no part of the name of the person named in the indictment.

6. **PRACTICE—allowing further evidence after argument has commenced.** The admission of further evidence on the part of the prosecution in a criminal case, after the case is closed and before the jury retires, is a matter resting in the sound discretion of the court; and when that discretion is not abused, the admission of such evidence can not be assigned for error.

7. On a trial for bigamy, after the evidence was closed and the State's attorney had opened the argument to the jury, and defendant's counsel had addressed the jury, the court took a recess. On the re-convening of the court, on motion of the State's attorney, the court allowed him to read in evidence certain portions of the statute of another State, and offered to allow the defendant the privilege of introducing further evidence, and to further argue the case to the jury: *Held*, no error.

8. **SAME—time to object—certificate to transcript on change of venue.** Where a change of venue is granted in a criminal case on the application of the defendant, if the authentication of the record by the clerk of the court from which the change is taken, is defective or informal, the objection thereto should be made by him to the court before the trial, or it will be considered as waived.

9. **JURISDICTION on constructive service—time of publication—in a Utah divorce case.** The record of a decree of divorce in the probate court of Utah Territory showed service on the defendant by publication, the first insertion of which in the paper was only thirty-five days before the date of the decree, while the law of that territory given in evidence required that forty days should intervene: *Held*, that the decree was void for want of jurisdiction.

10. **AMENDMENT OF RECORD after the term—want of notice.** Three years after a decree of divorce in a Utah court, the record was amended so as to show jurisdiction of the defendant by due publication, which amendment was made without notice to the defendant in the suit: *Held*, that the amend-

Brief for the Plaintiff in Error.

ment was a nullity, and could not be shown to cure a defect in the record or decree of divorce.

11. FORMER ADJUDICATION—*as to sufficiency of indictment.* Where this court holds an indictment sufficient, but reverses a conviction under the same and remands the cause, the judgment of this court will be conclusive as to the sufficiency of the indictment, on a second writ of error.

WRIT OF ERROR to the Circuit Court of Livingston county; the Hon. N. J. PILLSBURY, Judge, presiding.

Mr. RUFUS KING, for the plaintiff in error:

On writ of error to sustain his judgment, the party must show a good record. *Sweeney v. People*, 28 Ill. 210.

The authentication of the record by the clerk of the Kankakee circuit court is defective, in failing to show a full transcript of the record and proceedings. The clerk can not certify to what transpired in his court. He can only make a true transcript of the record. Rev. Stat. chap. 146, sec. 28; 1 Greenleaf on Evidence, sec. 498; *Marshall v. Adams*, 11 Ill. 38; *Cross v. Mill Co.* 17 id. 54; *City of Beardstown v. City of Virginia*, 81 id. 541.

The clerk can only certify to what he finds upon the files and records remaining in his office. *Augustine v. Doud*, 1 Bradw. 591; *Oaks v. Hill*, 14 Pick. 442; *Robbins v. Townsend*, 20 id. 345; *Wayland v. Ware*, 109 Mass. 248; Wharton on Crim. Ev. sec. 195.

It will be claimed that section 35, chapter 146, of the Revised Statutes, covers all defects. By that, only irregularities are waived, not essential to the jurisdiction. *Yates v. People*, 38 Ill. 533; *Rainey v. People*, 3 Gilm. 71; *Noecker v. People*, 91 Ill. 494; *Wight v. Kirkpatrick*, 4 Scam. 389; *Perteet v. People*, 70 Ill. 186.

The court erred in admitting the record of the marriage license and the certificate made and issued by the clerk of the county court, when the statute requires it to be done by the county clerk. Rev. Stat. chap. 89, secs. 7, 12; chap. 46,

Brief for the Plaintiff in Error.

sec. 16; chap. 35, secs. 3, 4, 5; chap. 25, sec. 2; chap. 34, sec. 63; chap. 147, secs. 10, 11; *Satterfield v. People*, 104 Ill. 448; *McCotta v. Harker*, 8 N. Y. 504.

As to variance in the name of the alleged former wife, see 1 Bishop on Marriage and Divorce, sec. 481; Wharton's Crim. Pl. and Pr. sec. 116; Wharton on Crim. Ev. secs. 94, 100; *Regina v. Gooding*, 1 C. & M. 297; *Price v. State*, 19 Ohio, 423; *State v. Hughes*, 1 Swan. 261; *Commonwealth v. Perkins*, 1 Pick. 389; *Commonwealth v. Hall*, 40 Me. 438; *Rex v. Duley*, 4 C. & P. 579; *State v. Horner*, 3 Pick. 362; *Davis v. People*, 19 Ill. 77.

The record evidence is in contravention of article 2, section 9, of the constitution, giving the accused the right to meet the witnesses face to face. Cooley on Const. 318; *People v. Lambert*, 5 Mich. 349; *State v. Thomas*, 64 N. C. 74; *Weyrich v. People*, 89 Ill. 90; *Goodwin v. State*, Meigs, 195.

On indictment for bigamy, a marriage in fact must be shown in both cases, and reputation, conduct, cohabitation and mere confession of the accused can not accomplish this. Confessions are only authoritative when there is clear proof of the *corpus delicti*, which, in bigamy, is the alleged first marriage. Wharton on Crim. Law, (8th ed.) sec. 1696.

It is settled that an admission, whether under oath or on examination, or otherwise, is not admissible to prove record facts. Wharton on Crim. Ev. secs. 153, 687; 2 Greenleaf on Evidence, (13th ed.) secs. 49, 461, 462; *People v. Humphrey*, 7 Johns. 314; *State v. Roswell*, 6 Conn. 446; *Miner v. People*, 58 Ill. 59; *South v. People*, 98 id. 261; *Miller v. White*, 80 id. 580.

The court improperly opened the case after the argument had begun. *Railroad Co. v. Jameson*, 48 Ill. 281; *White v. People*, 90 id. 117; *Tripp v. Cook*, 26 Wend. 143; *Railroad Co. v. Maroney*, 95 Ill. 179; *Mary v. State*, 5 Mo. 80; Lewin's Crown Cases, 151.

Briefs for the People.

Mr. GEORGE HUNT, Attorney General, for the People:

The certificate of the clerk of the circuit court of Kankakee county, that this is a copy, is in effect and substance that it is a transcript of the record. But this objection now comes too late. Rev. Stat. chap. 146, sec. 35; *Perteet v. People*, 70 Ill. 171; *Gardner v. People*, 3 Scam. 87; *McBain v. Enloe*, 13 Ill. 76; *Hitt v. Allen*, id. 592; *Yates v. People*, 38 id. 533; *People v. Zane*, 105 id. 667; *Logston v. State*, 3 Heisk. 414; *Goodhue v. People*, 94 Ill. 37.

Cohabitation with Mary E. Markham in this State completes the offence, although the marriage with her was in another State. *Hutchins v. Kimmel*, 31 Mich. 128; *Fleming v. People*, 27 N. Y. 329; Wharton on Conflict of Laws, secs. 170-173.

While the record evidence might, of itself, prove the marriage, the prosecution might properly produce other evidence of the fact. *Hayes v. People*, 25 N. Y. 396; *Hutchins v. Kimmel*, 31 Mich. 128.

The words, "county clerk," shall be held to include "clerk of the county court," and *vice versa*. Rev. Stat. chap. 131, sec. 1, clause 8.

Record evidence of the marriage was competent. *King v. Dale*, 1 Scam. 513; *Miller v. White*, 80 Ill. 580; *Conant v. Griffin*, 48 id. 410; *Jackson v. People*, 2 Scam. 231.

This court has already held that the indictment is sufficient. *Tucker v. People*, 117 Ill. 88.

The Utah court had no jurisdiction to render the alleged decree of divorce, and such decree was wholly void.

Mr. H. L. RICHARDSON, State's attorney, also for the People:

The record of the divorce in Utah is void for fraud and want of jurisdiction. The jurisdiction may always be inquired into. *Rose v. Hinly*, 4 Cranch, 241; *Elliott v. Pier soll*, 1 Pet. 628; *Harvey v. Tyler*, 2 Wall. 340; *Voorhees v. Bank*, 10 id. 437; *Hickey v. Stewart*, 3 How. 750.

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The doctrine that to give jurisdiction in a divorce suit the plaintiff must be a resident of the State or territory where the divorce is obtained, is universal. *Harrison v. Harrison*, 19 Ala. 499; *House v. House*, 25 Ga. 423; *Williamson v. Parisien*, 1 Johns. Ch. 389; *Hinds v. Hinds*, 1 Iowa, 36; *Kruse v. Kruse*, 25 Mo. 68; *Fellows v. Fellows*, 8 N. H. 160; *Winship v. Winship*, N. J. Eq. 107; *Dorsey v. Dorsey*, 7 Watts, 349; *Ditson v. Ditson*, 4 R. I. 87; *Fickle v. Fickle*, 5 Yerg. 203.

On the general doctrine of divorces fraudulently obtained in other States, see *Hanover v. Turner*, 14 Mass. 227; Am. Dec. 203, and note 206. Also, *Burlein v. Shannon*, 115 Mass. 447; *Doughty v. Doughty*, 27 N. J. Eq. 315; *Maguire v. Maguire*, 7 Dana, 181.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

The plaintiff in error, Edward D. Tucker, was indicted, at the April term, A. D. 1885, of the circuit court of Kankakee county, for bigamy, by the grand jury of that county. He was arrested, tried and convicted, but the judgment was subsequently reversed in this court on writ of error, and the cause was remanded for a new trial. After the cause was remanded, the defendant obtained a change of venue from Kankakee to Livingston county. A transcript of the record and the papers in the case were transmitted to the circuit court of Livingston county, where a second trial was had, and the defendant was again found guilty. To reverse the latter judgment the defendant sued out this writ of error.

The first error relied upon is, that the circuit court of Livingston county had no jurisdiction of the cause; and this supposed error is predicated upon what is supposed to be a defective transcript transmitted from the circuit court of Kankakee county to the circuit court of Livingston county. The defect relied upon is, that the clerk has certified to what transpired in court, rather than to a true transcript of the record. The certificate is as follows:

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"I, J. Frank Leonard, clerk of the circuit court in and for the said county, in the State aforesaid, do hereby certify that the foregoing is a true copy of the petition and affidavits; the organization of the grand jury; the return of the indictment against said defendant into open court; the plea of the defendant; the order for change of venue herein; and that the papers numbered from one (1) to five (5), both inclusive, are all the papers now on file in my office, forming any part of the record in this case. I further certify that I am the custodian of the records and files of said court. In witness whereof," etc.

Section 28, chapter 146, of the Revised Statutes, relating to change of venue, provides: "In all cases of change of venue, the clerk of the court from which the change is granted shall immediately make a full transcript of the record and proceedings in the case, and of the petition and affidavits, and order for the change of venue, and transmit the same, together with all papers filed in the case, including the indictment and recognizances of the defendant and all witnesses, to the proper court."

It is true that the certificate does not, in terms, state that the foregoing is a true copy of the record and proceedings, as required by the statute, and yet such is the substance of, and what was intended by, the certificate. But as we understand the law which must control the question, it will not be necessary to determine whether the certificate is technically accurate or not. The venue in this case was changed at the request and upon the application of the defendant. The record and papers upon which the defendant was tried were transmitted to Livingston county, upon his request. If the certificate of the clerk was irregular or defective, or if the record was otherwise defective, it was the duty of the defendant, before the trial began, to point out the defects, in order that such defects might be cured; but no objection was made by the defendant to the record, or any part thereof, as certified by the clerk of the circuit court of Kankakee county. Under such circum-

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stances, can he now be heard to complain that the circuit court of Livingston county had no right to proceed with the trial of the cause? We think section 35 of chapter 146, *supra*, furnishes the answer. That section is as follows: "All questions concerning the regularity of proceedings in obtaining changes of venue, and the right of the court to which the change is made to try the cause and execute the judgment, shall be considered as waived after trial and verdict."

In *Gardner v. The People*, 3 Scam. 83, where a change of venue had been taken from the circuit court of Scott to the circuit court of Morgan county, after a conviction, on writ of error it was objected, as here, that the circuit court of Morgan county had no right to try the prisoner, because the record of the proceedings in Scott county was not properly certified by the clerk, as required by the statute. In deciding the point raised, it is there said: "No objection was made in the court below, before or after verdict, to the regularity of the proceedings in Scott county, or to the authentication of the same when changed to Morgan county. If the authentication of the record was defective, the prisoner should have availed himself of it in the circuit court before trial. Not having done so, the irregularity, if in fact any existed, is cured by the statute (citing it,) as above." The same rule was laid down in *Perteet v. The People*, 70 Ill. 172, and the doctrine has been approved in other cases, but it will not be necessary to cite them. If the transcript from Kankakee county, or the certificate thereto, was defective or irregular, it was the duty of the defendant to interpose the objection before the trial. As he failed to speak when duly required, the objection now made for the first time comes too late.

The fourth count of the indictment charges that Edward D. Tucker, on the 15th day of April, 1872, in the county of Cook, Illinois, married Mary I. Bennett, and afterwards, while so married to said Mary, to-wit, on the 19th day of September, 1883, at, to-wit, the county of Kankakee, feloniously and un-

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lawfully did marry Mary E. Markham, *alias* Mary E. Rommel, (said Mary, his former wife, being then alive,) contrary to the form of the statute, etc. For the purpose of proving the marriage between the defendant and Mary I. Bennett, a certified copy of a license, and return thereon, were read in evidence. The license was signed by George W. Wheeler, clerk of the county court, and it is insisted that such license was invalid, because the statute only authorized the county clerk to issue a license. Under our statute, the county clerk is clerk of the county court,—one and the same person is county clerk and clerk of the county court; and the fact that George W. Wheeler, who was county clerk and clerk of the county court, signed the license as clerk of the county court, did not affect its validity. This question is fully met by section 1, chapter 131, of the Revised Statutes of 1874, which declares that the words "county clerk" shall be held to include "clerk of the county court," and the words, "clerk of the county court," to include "county clerk."

It is also said that there was a variance between the charge in the indictment and the proof. The averment in the indictment is, that defendant was lawfully married to Mary I. Bennett, while the proof showed a marriage to Mary Bennett. We do not regard the alleged variance of any importance. The letter "I" was no part of the name of the person mentioned in the indictment, and the evidence of a marriage to Mary Bennett was sufficient proof of the fact as laid in the indictment.

Complaint is also made that the court permitted certain letters of the defendant, written to his former wife, Mary Bennett, to be read in evidence. These letters were written while the defendant and Mary Bennett were living together as husband and wife. They were addressed to her as his wife, and contained admissions that she was his wife. They also show that the parties were living together as husband and wife, and that she was acknowledged and treated by him as his wife. In a prosecution for bigamy, section 29, chapter 38, of the

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Revised Statutes of 1874, provides: "It shall not be necessary to prove either of the marriages by the register or certificate thereof, or other record evidence; but the same may be proved by such evidence as is admissible to prove a marriage in other cases." In civil cases, Greenleaf, (vol. 2, sec. 462,) says: "Marriage may be proved by reputation, declarations and conduct of the parties, and other circumstances usually accompanying that relation. * * * In regard to the language and conduct of the parties, it is competent to show their conversation and letters addressing each other as man and wife." Under the rule indicated, there can be no doubt in regard to the competency of the evidence. Whether the marriage, in a prosecution of this character, might be established solely by such evidence, it will not be necessary, here, to determine. The evidence tended to prove the marriage, and, as such, it was competent, in connection with the other evidence bearing upon the question.

It is also urged, that under the constitutional guaranty of the statute, the defendant had the right to meet the witnesses face to face, and that the record proof of marriage, consisting of a certified copy, from the records of the county clerk, of the certificate of the person who performed the marriage ceremony indorsed on the back of the license, was and is a violation of that right. In other words, the argument is, that record evidence of marriage is not admissible, but the law required the prosecution to produce the person who solemnized the marriage, as a witness, in order that the defendant might meet him face to face, and exercise the right of cross-examination.

Section 9, of chapter 89, of the Revised Statutes of 1874, provides that the minister, judge or justice of the peace shall, within thirty days after a marriage is solemnized, make a certificate thereof, and return the same, together with the license, to the clerk of the county in which the marriage occurred. Section 11 provides that the county clerk, upon receiving such certificate, shall make a registry thereof in a book to be kept

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in his office for that purpose. He shall also indorse on such certificate the time when the same is registered, and shall number and carefully preserve the same. Section 12 declares that such certificate, or a copy of the same, or of the entry of such registry, certified by the county clerk under the seal of the county, shall be received as evidence of the marriage of the parties as therein stated.

In *Jackson v. The People*, 2 Scam. 231, which was a prosecution for bigamy; the record evidence of marriage was held admissible. In that case, however, the constitutional question does not seem to have been raised, but if it had been raised and relied upon, we do not think the result would have been different. Under the constitutional guaranty the depositions of witnesses can not be taken and read in evidence in a criminal prosecution, as is done in a civil case, because this would be a direct denial of the right to meet the witnesses face to face. But the provision, "in all criminal prosecutions the accused shall have the right to meet the witnesses face to face," in our judgment has no reference to record evidence which may, during the progress of a criminal trial, become necessary to establish some material fact, to secure a conviction. The offered transcript consisted of a public record, which is declared by the law to be evidence. The record imports verity, and a cross-examination is foreign to and has no application to this character of evidence.

After the evidence had been closed by both People and defendant, the attorney for the People made an argument to the jury, and he was followed by an argument in favor of the defendant. At the conclusion of the argument in behalf of defendant the court took a recess for dinner. When the court met after recess, the counsel for the People entered a motion for leave to introduce in evidence certain portions of the statute of Minnesota. This motion was allowed, and the statute was read in evidence, and the ruling of the court is relied upon as error. It appears from the bill of exceptions, that the court,

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upon allowing the evidence to be introduced, offered to allow the defendant the right to introduce further evidence in his behalf, if he desired, and to further argue his case to the jury. The admission of further evidence after the case had been closed, and before the jury had retired, was a matter resting in the sound discretion of the court, and as it does not appear that the discretion was abused, we do not think the court erred. The failure on the part of the attorney for the People to read in evidence the statute of Minnesota, was a mere oversight, and it was but just that he should be allowed to introduce the evidence, as the defendant was in no manner injured, the court having allowed him the right to rebut the evidence if he wished, and to argue its force and effect to the jury.

As a defence to the indictment, the defendant introduced in evidence the statutes of the territory of Utah, showing authority in the probate courts to grant divorces. Also, exemplification of record of proceedings in the probate court of the county of Salt Lake, wherein plaintiff in error was complainant, and Mary I. Bennett, defendant, and a decree of divorce granted the complainant therein on May 23, 1883. The service, as appears from the record in the divorce proceeding, was had by publication in a newspaper. The statute read in evidence required the notice to be published four times consecutively in a newspaper having a general circulation in the territory, the first insertion to be at least forty days before the commencement of the term of court. The notice was published for one month in a weekly newspaper, first insertion of date April 18, 1883, last, May 9, 1883. The decree was rendered on the 23d day of May, but thirty-five days from the date of the first publication. From the facts appearing on the face of the record, it is manifest that the court in Utah, where the decree was rendered, had no jurisdiction of the person of the defendant in the divorce proceeding, and having no jurisdiction, the decree was void.

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The defendant attempted to introduce an amendment of the record, made nearly three years after the divorce was granted, to cure the defect appearing in the record; but this amendment was made without notice to the defendant in the proceeding, and was, as the circuit court properly held, a nullity. What authority the court in Utah had to amend the record in a matter of substance almost three years after a final decree was rendered, does not appear, but if it had such authority, it could only be exercised on full notice to the party interested.

Objection is made to the indictment, but when the case was here before, the indictment was held to be sufficient, and that decision must be held to be conclusive as to its sufficiency.

Some of the instructions given for the People have been criticised, and the decision of the court in modifying some of the defendant's instructions, is objected to; but upon an examination of all the instructions, we find no substantial error. Indeed, we find no error in the record which will authorize a reversal of the judgment.

The judgment will be affirmed.

Judgment affirmed.

THE CHICAGO, BURLINGTON AND NORTHERN RAILROAD COMPANY

v.

ALICE BOWMAN et al.

Filed at Ottawa November 11, 1887.

1. COSTS—*witness fees to be taxed—limiting number of witnesses—in proceedings under Eminent Domain act.* The general Cost act applies to proceedings to condemn land under the Eminent Domain act, and under it the court may, after the conclusion of the evidence, limit the number of witnesses whose fees are to be taxed against any party, not less than two, as may appear to have been necessary.

2. SAME—*time of application to limit number of witnesses whose fees may be taxed—and how far discretionary.* A motion to limit the number of witnesses called by a defendant, whose fees are to be taxed against the

122	596
125	396
122	595
126	190

122	595
134	15

122	595
136	14

136	472
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122	595
41a	590

122	595
147	389

122	595
150	378

152	252
44a	399

122	595
71a	572

122	595
81a	609

122	595
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91a	* 26
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122	595
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93a	* 417
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122	595
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193	* 471
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193	* 475
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122	595
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194	* 579
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122	595
206	*188
109a	* 15
122	596
208	*104
208	*106
122	595
111a	79

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plaintiff, made before the defendant has examined his witnesses, is premature, and therefore properly overruled.

3. There is no inhibition upon parties calling as many witnesses as they may desire; but every party must assume the risk of having taxed against him the fees of all such witnesses as the court may find were unnecessary, being not less than two. A motion to restrict a party to a certain number of witnesses whose fees may be taxed as costs, is addressed to the discretion of the trial court, and its decision is not subject to review, except where the discretion is abused.

4. **EMINENT DOMAIN—measure of damages—as to land taken.** The fair market value of land proposed to be taken for public use under the Eminent Domain act, having proper regard to the location and advantages as to situation and the purposes for which it was designed and used, is the proper measure of compensation to be awarded.

5. Where a part is taken, and that part has a greater value, in connection with the whole, than as a separate parcel, the measure of damages will be the fair cash value of the part taken, as a part of the whole.

6. **SAME—measure of damages—as to part not taken.** Where a cross-complaint is filed for damages to land not sought to be taken, but a part of that sought to be condemned, the jury should award to the owner such damages, in cash, as his lands not taken will sustain, if any, by reason of the construction of the proposed railroad, and its continued use and operation, through his farm. In such case it is proper for the jury to give damages for all actual and appreciable injuries resulting from the construction and operation of the proposed railroad.

7. If the lands not taken will be depreciated in value by the construction and operation of the proposed railroad, the measure of damages will be the difference in their market value before the construction of the road, and after its construction. In determining this, the jury may consider the injury to the land arising from inconveniences actually brought about by the construction of the proposed railroad, or incidentally produced by dividing the land as to water, pastures and improvements, although such injury may not be susceptible of definite ascertainment, and also for such incidental injury as would result from the perpetual use of the track for moving trains, or from danger of killing stock, or injury to pasturing stock, or escape of fire, and generally for such damages as are reasonably probable to ensue from the construction and operation of the proposed road.

8. The physical condition of land over which a right of way is sought to be condemned for a railroad, whether affected by another railroad, a water-course, or other natural or artificial object, must be considered in the proceeding,—not in respect to the damage or depreciation caused by such other railroad, water-course, etc., but for the purpose of determining the damages occasioned to the owner by the proposed improvement.

Brief for the Appellant.

9. **SAME—proximate and remote damages.** While it is true that only real, tangible and proximate damages are recoverable, yet it is all such damages as are reasonably probable, as distinguished from possible, speculative or remote damages, that form the proper basis of recovery.

10. **SAME—of an instruction—whether permitting remote or speculative damages.** An instruction that the land owner is entitled to just compensation for the land taken, and for all “reasonable and probable damage” to the balance of his land not taken, caused by taking the strip condemned for the uses and purposes of the proposed railroad, is not obnoxious to the objection that it opens the door to let in remote, conjectural and speculative damages.

11. **BILL OF EXCEPTIONS—when necessary.** Affidavits filed in a cause do not become a part of the record sent up on appeal or error, unless made so by being incorporated into a bill of exceptions.

APPEAL from the County Court of Carroll county; the Hon. B. L. PATCH, Judge, presiding.

Mr. JAMES SHAW, and Mr. D. S. BERRY, for the appellant:
The court should have sustained appellant's motion to limit appellee's witnesses. Appellant examined only eight witnesses, while appellee examined nineteen, and kept in attendance nine more. The court should have required appellee to pay a part of the costs.

The court may limit the fees to be taxed when the privilege of calling witnesses has been abused, and when the trial court fails to exercise its discretion this court may compel it. *Stock Yards Co. v. Moore*, 5 Am. and Eng. Ry. Cas. 351; *Firman v. Firman*, 109 Ill. 63.

In estimating compensation and damages in railroad condemnation cases, it is improper to consider imaginary or speculative damages, or remote and improbable consequential damages, which may or may not happen in the future, or such damages as result from future wrongful acts, which afford proper causes of action when they occur. Of this kind of damages are supposed dangers of future fires; frightening stock in pastures, or killing them on the track; flooding meadows, or serious interference with the after-flow of surface waters; noises and smoke

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in the running of trains over remote farm lands, and inconveniences suffered from other railroads being operated over the same land; or to build fences or farm crossings. *Stone v. Railroad Co.* 68 Ill. 394; *Jones v. Railroad Co.* id. 380; *Railroad Co. v. Burkett*, 46 Ala. (N. S.) 569; 1 Redfield on Railways, 358, par. 11; *McReynolds v. Railroad Co.* 106 Ill. 152; *Railroad Co. v. Francis*, 70 id. 238; Mills on Eminent Domain, 193.

As to the rule of assessing damages where one railroad is upon the farm, or where one railroad runs along the side of another, see Mills on Eminent Domain, 167; 17 Minn. 322; 13 N. Y. 149.

The unwillingness of the owner to part with his property, nor the necessities of the condemning corporation, nor the adaptation of the land to the purposes of the railroad, nor what the land would be worth to the witnesses in the shape taken, are proper elements for the consideration of the jury. Pierce on Railways, 213; Mills on Eminent Domain, 168.

The court erred in instructing that the jury might allow all probable damages. *Railroad Co. v. Railroad Co.* 105 Ill. 110; *Reynolds v. Railway Co.* 106 id. 152; *Jones v. Railroad Co.* 68 id. 380.

Mr. J. M. HUNTER, for the appellees, argued the case at some length on the evidence.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

This was a proceeding by the appellant company, in the county court of Carroll county, to condemn the right of way across the land of three separate owners. Three separate trials were awarded,—the cause arising on the petition and the cross-petition of appellee Alice Bowman being first tried. Appellant called eight witnesses, and on its application the jury were sent to view the premises, and appellant then rested.

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Before appellee had offered any evidence, appellant moved the court to limit the number of witnesses called and in attendance upon behalf of appellee, whose fees were to be taxed against appellant, to such number,—not less than two,—as should appear to the court to be necessary for the proper trial of the issues involved, which motion the court overruled. This ruling is assigned for error.

The act under which this proceeding is conducted makes no provision respecting costs, and the general Cost act applies. Section 15 of the chapter on costs reads: "The court may limit the number of witnesses whose fees are to be taxed against any party, to such number, not less than two, as shall appear to the court to have been necessary." There is no inhibition upon parties calling as many witnesses as they may desire, but every party must assume the risk of having taxed against him the fees of all such witnesses as the court may find were unnecessary. This court so held under a former statute limiting the number of taxable witnesses to four, unless the court certified that a greater number were necessary. *White v. Hermann*, 51 Ill. 243.

The question here presented relates more particularly, however, to the time when such application should be made, and when the court can properly be called upon to act. Holding the affirmative, appellant's witnesses were heard first, and this hearing ran into the fourth day of the trial, and appellee, with her witnesses, must perforce wait till appellant concluded. Before a single witness of appellee had been or could have been heard, appellant made this motion. How the court, in advance, could exercise its discretionary power of determining what witnesses were or were not necessary to the maintenance of appellee's case, is not apparent. At the conclusion of the trial the court could act upon such a motion intelligently and fairly, but surely it could not do so before it had heard the witnesses. The motion was premature, and was therefore properly denied. But if this motion had been made or renewed at the conclusion

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of the testimony, its allowance or disallowance, resting in the sound discretion of the trial judge, would not be the subject of review unless such discretion had been abused. The facts of this case were complicated, and the twenty-one witnesses called by appellee were, as it seems to us, fairly distributed, upon the several inquiries properly made, and under the circumstances of this case we are unable to say there was any abuse of discretion in denying the motion.

It is also contended that appellee kept in attendance eight witnesses who were not sworn, and that the fees of these witnesses were wrongfully taxed against appellant. There is in the record a conditional judgment against appellant for \$3950 and "the costs of this proceeding," but the record does not show the amount of costs taxed, nor the items going to make up the bill of costs. We can not know, therefore, whether fees of attending witnesses not sworn have been taxed or not. There are a number of affidavits of witnesses claiming attendance, but they form no part of the record properly certified to this court. If appellant desired to make them a part of the record it should have procured them to be incorporated into the bill of exceptions, for in this way, only, can affidavits filed in a case become a part of the record.

It is further contended that the damages found by the jury were excessive and unjust, and largely made up of improper elements. In reaching their determination it was competent for the jury to award appellee compensation, in dollars and cents, for the fair market value of the land proposed to be taken, having proper regard to the location and advantages as to situation, and the purposes for which it was designed and used. *Jacksonville and Southeastern Railway Co. v. Walsh*, 106 Ill. 253; *Chicago and Northwestern Railway Co. v. Chicago and Evanston Railroad Co.* 112 id. 589; *Dupuis v. Chicago and North Wisconsin Railway Co.* 115 id. 97; *Chicago and Evanston Railroad Co. v. Jacobs*, 110 id. 414; *DeBuol v. Freeport and Mississippi River Railroad Co.* 111 id. 499. And where but

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a part is taken, and the part taken is of greater value, in connection with the whole, than as a separate parcel, the measure of damages will be the fair cash value of the part taken, as a part of the whole. (*Chicago and Evanston Railroad Co. v. Blake*, 116 Ill. 163.) Under appellee's cross-petition it was the duty of the jury to award to appellee such damages, in dollars and cents, as her lands not taken would sustain, if any, by reason of the construction of the proposed railroad, and its continued use and operation through her farm. It was competent for the jury to consider and give compensation for all actual and appreciable injuries resulting from the construction and operation of the proposed railroad. (*Alton and Sangamon Railroad Co. v. Carpenter*, 14 Ill. 190.) And if the lands not taken would be depreciated in value by the construction and operation of the proposed railroad, the measure of damages would be the difference in their market value before the construction of the road and after its construction. *Chicago and Pacific Railroad Co. v. Francis*, 70 Ill. 238; *Page v. Chicago, Milwaukee and St. Paul Railway Co.* id. 324; *Eberhart v. Chicago, Milwaukee and St. Paul Railway Co.* id. 347; *Chicago, Milwaukee and St. Paul Railway Co. v. Hall*, 90 id. 42; *Dupuis v. Chicago and North Wisconsin Railway Co. supra*. In determining this, the jury would be justified in considering the injury to her land arising from inconveniences actually brought about and occasioned by the construction of the proposed railroad, or incidentally produced by dividing her land as to water, pastures and improvements, although such injury and damage might not be susceptible of definite ascertainment. *Jones v. Chicago and Iowa Railroad Co.* 68 Ill. 380; *Rockford, Rock Island and St. Louis Railroad Co. v. McKinley*, 64 id. 338; *McReynolds v. Burlington and Ohio River Railway Co.* 106 id. 152; *Chicago and Iowa Railroad Co. v. Hopkins*, 90 id. 316. And for such incidental injury as would result from the perpetual use of the track for moving trains, or from danger of killing stock, or injury to pasturing stock, or escape of fire,

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and generally for such damages as are reasonably probable to ensue from the construction and operation of the proposed road. *St. Louis and Southeastern Railway Co. v. Teters*, 68 Ill. 144; *McReynolds v. Burlington and Ohio River Railway Co.* *supra*; *Rockford, Rock Island and St. Louis Railroad Co. v. McKinley*, *supra*; *Chicago and Iowa Railway Co. v. Hopkins*, *supra*.

It will subserve no good purpose to enter into an extended discussion of the evidence. It is sufficient to say, that the most careful examination of the evidence discloses that every element of damage shown, fell clearly within the rules thus repeatedly announced by this court, as to the proper elements to be considered by the jury in arriving at what is just compensation to the owner of the land, in proceedings of this character. So far as we can perceive, no single element of damage was included in the evidence admitted to the jury, not warranted by the decisions of this court above referred to.

Our attention has been directed to a number of detached sentences and expressions of witnesses, showing, as is contended, that the damages done by the location and operation, through the farm of appellee, of the Chicago, Milwaukee and St. Paul railroad, were included in the witnesses' estimate of appellee's damages, and therefore presumably in the verdict of the jury. The expressions, as quoted by counsel, of the witness Bailey, are as follows: "This estimate of \$2300 damages is made in reference to the fact that there is another railroad,—the Chicago, Milwaukee & St. Paul railway,—across the land, farther north. If there were no other railroad across the farm, \$100 per acre for the land (eighteen acres taken) would be a very big price. I embrace all the elements of damage in my answer." As to this witness, he was placed on the stand by appellant, and his answer complained of was called out upon his examination in chief, and went to the jury without objection. If it was exceptionable, objection should

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have been then made, and the court at the proper time asked to instruct the jury to disregard it.

But if this excerpt be taken in connection with what preceded and followed it, it is not perceived that the testimony is open to the objection made. The witness estimates the damage of appellee at \$2300, including the value of the land taken. This estimate is made up of the land taken and the depreciation of the strip cut off south of appellant's road, which he says would be depreciated one-half in value, and then adds: "I put on the extra damage above the \$1000 because the new railroad runs along as close as it does to the other railroad." The same may be said with entire accuracy in respect to the statements complained of, made by other witnesses,—that when the whole testimony of the witness is considered it will be found that it was the damage to appellee's land, by reason of the construction and operation of appellant's road, alone, that entered into the estimate of damage by the witness. As a matter of course, the damages occasioned by the construction of the old road could form no element for recovery in this case, but we are not prepared to say, as a matter of law, that in considering the compensation to be allowed an owner for the construction and operation of a railroad across his farm, the fact that the land is already crossed by one road may not be taken into consideration by the jury in determining the damages by reason of the construction of the new line of road,—not that the damages occasioned by the old road, if any, can be recovered, but as a physical fact affecting the value of the farm, as a whole. We can well comprehend how the damages an owner would sustain by the construction of a railroad through his farm might be augmented by the fact that the farm had already been cut into two parts by another railroad, and it might well be that, if the value of the farm had been depreciated by the road formerly constructed over the same, the damages occasioned by the construction of the pro-

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posed road might be less than they otherwise would be. The physical condition of the land,—whether affected by another railroad, a water-course, or other natural or artificial object,—must be considered, not in respect of the damage or depreciation caused by such other railroad or water-course, etc., but for the purpose of determining the damages occasioned to the owner by the proposed improvement.

We are satisfied that the statements of witnesses referred to by counsel, taken with their testimony as a whole, are not open to the objection made; but if it were otherwise, it does not follow that the verdict of the jury is tainted with the false elements suggested. The jury were specially instructed upon this very point by appellant's eleventh instruction, as follows:

"The court instructs the jury, that in estimating the just compensation and damages to which the owners of the land in this case are entitled for the land taken and damages for contiguous lands, the jury should confine themselves to damages done by the petitioning railroad company alone. In this case the Chicago, Burlington and Northern Railroad Company should only pay for the land taken by it, and the damage it alone does to contiguous property,—damaged, but not taken. No damages done by any other railroad company to the lands in question should be regarded or estimated by the jury."

No reason has been suggested or is perceived for supposing that the jury disregarded the instruction.

But it is said, as before stated, that the verdict is excessive and unjust. This objection calls in question the justness of the conclusion drawn by the jury from the evidence, not only of the witnesses who testified, but of the evidence presented to the jury by and through their personal view and inspection of the premises. In this case the jury viewed the premises, and as said by this court in *Mitchell v. Illinois and St. Louis Railroad and Coal Co.* 85 Ill. 566, "the jury had a right to draw their own conclusions from such observations, as well as from other testimony offered in the case." What conclusions the

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jury drew in this case from the observation of appellee's premises, in connection with the purpose of appellant to take a portion of these premises for the purposes proposed, can be known only as we find it expressed in the sum of money awarded to appellee by their verdict.

There was great conflict in the evidence as to the damages. Appellant's own witnesses differed materially as to the value of the farm as an entirety,—two placing its value as low as \$40 per acre, three at \$50, and two at from \$50 to \$60,—and when these witnesses came to estimate the whole damage appellee would sustain, their estimate ranged from \$2000 to \$2500. The witnesses of appellee,—farm-owners and persons familiar with the value of farm lands in that vicinity,—valued the farm as an entirety at from \$60 to \$70 per acre, eleven of them placing the figure at \$65; and when these witnesses came to estimate the whole damage appellee would sustain, it ranged from \$3600 to \$5000, sixteen of them estimating the damage at \$4000 or more. It is thus seen that this verdict, if we exclude any conclusion the jury may have drawn from their personal inspection and view, is sustained by a clear preponderance of the evidence. It would seem, therefore, that the verdict was the result of deliberation and consideration, and not of passion and prejudice, and as the candid judgment of an unprejudiced jury in a case where the facts were not free from complication and the evidence conflicting. Under such circumstances the court would not be warranted in disturbing the verdict of the jury, especially as, in view of all the circumstances of the case, it seems to us that substantial justice has been done.

It is urged that the court erred in giving appellee's fifth, sixth and seventh instructions. The vice of these several instructions is said to be in that the jury were thereby told that the land owner was entitled to just compensation for the land taken, and for all "reasonable and probable damage" to the balance of her land not taken, caused by taking the strip con-

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demned, for the uses and purposes of the proposed railroad. It is said that by the use of the words, "reasonable and probable damage," the door was opened to let in remote, conjectural and speculative damages. We do not think so. While it is true that only real, tangible and proximate damages are recoverable, (*Peoria and Pekin Union Railway Co. v. Peoria and Farmington Railway Co.* 105 Ill. 110,) yet it is, as said in *McReynolds v. Burlington and Ohio River Railway Co.* (106 Ill. 153,) all such damages as are reasonably probable, as distinguished from possible, speculative or remote damages, that form the proper basis of recovery. The jury were fully and fairly instructed as to the elements proper to be considered by them, and in considering such elements, these instructions told them they were to give such damages as, in judgment and reason, probably or naturally would result to appellee's land not taken, by reason of the taking of the strip condemned, and its use and occupation for the purposes designed by appellant. The jury could not have understood that by the use of the term, "reasonable and probable damage," any new element of damage was permitted or intended to be considered, but that in fixing the amount for the damages resulting, they would be justified in giving such sum as would reasonably compensate appellee for probable injury. But if this was not so, in view of the evidence, it is manifest appellant was not prejudiced by the instructions complained of.

Finding no error in the record, the judgment of the county court of Carroll county is affirmed.

Judgment affirmed.

Syllabus. Brief for the Appellant.

JONATHAN G. VALLETTE

v.

JOHN H. TEDENS *et al.*122 607
139 301

Filed at Ottawa November 11, 1887.

122 607
208 1414

1. TRUST—*when a trust will arise—abuse of trust and confidence by an agent.* Where a confidential agent is employed to examine title to land, with a view of correcting defects therein, and to assist his employer in acquiring title to adjacent land, and, as such agent, is intrusted with his principal's abstracts of title, and receives information to aid him in procuring the title, if he, while so acting, acquires the title in his own name, in violation of his duty, he will, in equity, be held to hold such title in trust for his principal.

2. Persons engaged in the business of making abstracts of title, occupy a relation of confidence toward those employing them, second, only, in the sacredness of its nature, to that between an attorney and his client, and should be held to a strict responsibility in the exercise of the trust and confidence reposed in them. Any abuse of such trust and confidence should receive an emphatic rebuke.

3. STATUTE OF FRAUDS—*abuse of trust and confidence by an agent.* If an agent employed by another to look up the title to a tract of land, and purchase the same, conceals information acquired by him, and takes the title in his own name, denying his agency and employment, a court of equity will compel him to convey the land to his principal, although he may plead the Statute of Frauds in defence.

APPEAL from the Circuit Court of Du Page county; the Hon. C. W. UPTON, Judge, presiding.

Mr. HENRY DECKER, for the appellant:

Where a man merely employs another, by parol, as an agent to buy an estate, and the agent buys it, using his own money, and denies the trust, the agent can not be compelled to convey unless there is an agreement in writing to that effect. In such a case there is no resulting trust, and no such fraud, accompanied with injury, as would bring the case within the exceptions of the statute. 2 Story's Eq. Jur. sec. 1201; Perry on Trusts, sec. 135; 2 Sugden on Vendors, 911; *Bartell v. Pickergill*, 21

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East, 577; *Hill v. Smith*, 4 Johns. 240; *Davis v. Wetherell*, 11 Allen, 19; *Parsons v. Phelan*, 134 Mass. 109; *Boyd v. McLean*, 1 Johns. Ch. 582; *Stein v. Stein*, 5 id. 19; *Smith v. Burnham*, 3 Sumner, 464; *Pastel v. Hutchinson*, 1 Dickens, 44; *Dorsey v. Clarke*, 4 Harr. & Johns. 550; *Jackman v. Ruyland*, 4 W. & S. 149; *Pinnock v. Clough*, 16 Vt. 500; *Lemos v. Bailey*, 2 Vern. 627; *Atkins v. Rowe*, Mosley, 39, cited and commented on in 3 Sugden on Vendors, (6th Am. ed.) 171; *Remington v. Campbell*, 60 Ill. 516; *Sheldon v. Harding*, 44 id. 68; *Holmes v. Holmes*, id. 168; *Bruce v. Roney*, 18 id. 67; *Loomis v. Loomis*, 28 id. 454; *Williams v. Brown*, 14 id. 200.

A resulting trust, within the exception of the statute, can only arise when the purchase money, or some aliquot part thereof, has been paid by the party seeking to enforce it. *Pinnock v. Clough*, 16 Vt. 503; *Perry v. McHenry*, 13 Ill. 227; *Lloyd v. Spillett*, 2 Atk. 150; *Sayre v. Townsend*, 15 Wend. 650; *Heacock v. Coalsworth*, Clarke's Ch. 83; *Botsford v. Burr*, 2 Johns. Ch. 405; *Fickett v. Durham*, 109 Mass. 419; *Barnard v. Jewett*, 97 id. 88; *Kendall v. Mann*, 11 Allen, 17.

Where there are no resulting trusts, the exceptions are confined to cases of fraud in the execution of the trust, where confidential relations exist, or of fraud accompanied with injury, or where fraudulent advantage has been taken by an agent through his knowledge of the affairs of his principal, and to the substantial injury of the principal. *Clarkson v. Richardson*, 69 Ill. 137; *Cramer v. House*, 93 id. 503; *Perry v. McHenry*, 13 id. 227; *Sweet v. Jacocks*, 6 Paige, 355; *Lees v. Nuttall*, 1 R. & M. 53; *Sheriff v. Neal*, 6 Watts, 534; *Watson v. Erb*, 33 Ohio St. 35; *Burden v. Sheridan*, 36 Iowa, 125; *Arnold v. Cord*, 16 Ind. 177; *Lillard v. Casey*, 2 Bibb, 459; *Combs v. Little*, 3 Green Ch. 314; *Healy v. Lorain*, 1 Dev. & Bat. 626; *Collins v. Sullivan*, 135 Mass. 461; *Davis v. Hamlin*, 108 Ill. 39.

In this case there was neither payment of purchase money nor a violation of duty in taking the conveyances, (there were several from different heirs,) to appellant, nor did appellees

Brief for the Appellees.

have any interest in the lands, legal, equitable or honorary, whereby they suffered any injury in failing to acquire the lands in controversy.

On the showing of appellees, there were no circumstances of special confidence between the parties.

Messrs. Comstock & Hess, for the appellees:

The Statute of Frauds was intended to suppress frauds, and courts of equity will always interpose to prevent its being used as a shield to protect fraud. *Ryan v. Nevins*, 34 N. Y. 307; *Jenkins v. Eldridge*, 3 Story, 181; *Manning v. Hayden*, 5 Sawyer, 360; 1 Perry on Trusts, sec. 85.

A trustee will not be permitted to purchase property with reference to which he is placed in a situation of trust and confidence. 1 Story's Eq. Jur. sec. 323.

If an agent employed to purchase for another, purchases for himself, he will be considered as a trustee for his employer. *Terry v. Bank of New Orleans*, 9 Paige, 649; *Van Epps v. Van Epps*, 9 id. 237; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Banks v. Dudale*, 8 Conn. 145; *Johnson v. Blackman*, 11 id. 342; *Church v. Sterling*, 16 id. 388; *Day v. Roth*, 18 N. Y. 448; *Safford v. Hynds*, 39 Barb. 625; *Baker v. Whiting*, 3 Sumner, 476; *Reitz v. Reitz*, 80 N. Y. 538; *Bartholomew v. Leech*, 7 Watts, 472; *Ringo v. Binns*, 10 Pet. 269.

But it is not necessary, in order to bring the defendant within the rule laid down, that he should have made any actual agreement to secure the property for the complainants. It is sufficient if he was placed in such a position of confidence with reference to the premises, that any purchase by him would be inconsistent with his duty to the complainants. *Davis v. Hamlin*, 108 Ill. 39.

Wherever one person is placed in such relation to another by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him or interested

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with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated. *Merryman v. David*, 31 Ill. 404; *McDonald v. Fithian*, 1 Gilm. 269; *Dennis v. McCagg*, 32 Ill. 429; *Klock v. Walter*, 70 id. 417; *Hughes v. Washington*, 72 id. 85.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

In the fall of 1884 and winter of 1884 and 1885 the appellees were merchants, engaged in business under the firm name of Tedens & Co. in the town of Lemont in Cook county. One Walker had become largely indebted to them and had given them a mortgage upon certain lands owned by him in DuPage county. This mortgage they had foreclosed and had acquired title to the lands embraced in it through the foreclosure sale. In addition to this, they also had judgments against Walker, which they were desirous of making out of whatever lands or interests in lands he might own that were not included in the mortgage.

At this time appellant was the county surveyor of DuPage county. He was also engaged in the business of examining titles and making abstracts of titles, and had an office, where he carried on such business, in Wheaton, DuPage county. On November 18, 1884, appellees wrote to appellant the following letter:

"LEMONT, ILL., November 18, 1884.

"*County Surveyor, Wheaton, Ill.:*

"DEAR SIR—When can you come and make survey of the land known as the 'Walker tract,' in DuPage county? We now own it, and wish to fence and rent; therefore a survey is very necessary. Hoping you will favor us with an early reply, and that you will come soon, now while the weather is so fine and good for such work, we are

Yours, etc.,

J. H. TEDENS & CO."

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Pursuant to the notice contained in this letter appellant went to Lemont on December 1, 1884, and was there engaged for four days in making surveys for appellees and in consulting with them about titles to property, in which Walker was supposed to have an interest. The land or a part of the land, to which appellees had acquired title by the foreclosure proceeding, consisted of about one hundred acres in that part of the north-east quarter of section 15 lying north of the north channel of the Des Plaines river, there being an island at this point, around which the river flows in two channels, one to the north and the other to the south of the island. The land in controversy in this suit is a tract of forty-five acres, situated on the island in question in the south-east corner of the north-east quarter of section 15, south of the north channel of the river, and opposite the one hundred acres above mentioned.

Appellees had supposed until after the foreclosure, that the forty-five acres were included in their trust deed; this, however, did not prove to be the case. They had also supposed that the forty-five acres belonged to Walker. Walker had been in possession of it at one period for some twelve years or longer, and was reputed to have acquired his title from a widow named Warden, who had also owned the balance of section 15. While appellant was in Lemont during the first four days of December, 1884, he also shared the belief that Walker had title to the forty-five acres, although both he and appellees were aware at this time that the land was not taxed. While engaged in this survey for appellees, appellant learned from them the location and surroundings of the forty-five acres. Both the appellees swear, that, on December 2 or 3, they employed appellant, as an examiner of titles, to search the records and look up the title to the forty-five acres and to assist them in acquiring such title. They are confirmed in their statements by the testimony of one Graves. At the same time they gave appellant a list of other lands in sections 14, 15 and 16, in which Walker was supposed to be interested, and employed

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him to ascertain the condition of the title to these lands with a view of subjecting them to the payment of their judgments.

On the evening of December 4, when appellant left Lemont, appellees placed in his hands their own abstract of title to the lands they had obtained from Walker, and requested him to examine the title, so that, if there were any defects, they might be remedied. At their request he made a map of the lands lying in sections 14, 15 and 16 and left it with them.

Appellant procured the title to the forty-five acres in question for himself, denying the existence of any agreement to obtain it for appellees, and pleading the Statute of Frauds. The object of this bill is to compel him to convey the land to appellees, on the ground that he holds it as their agent and trustee.

After leaving Lemont appellant made examinations in the records and tax books of Du Page county and in the books of certain abstract makers in Chicago, and on December 8, 1884, wrote the following letter:

"WHEATON, ILL., December 8, 1884.

"*J. H. Tedens & Co., Lemont, Ill.:*

"GENTS—I have looked up the 5.07 acres N. Frac. N. W. $\frac{1}{4}$ Sec. 14, 37.11, and find that it was entered June, 1835, by Philip C. Latham, and conveyed by him to Thomas Haughan June 5, 1842. I don't think it has been conveyed since by the owner. As to the 45 or any Island Frac. N. $\frac{1}{2}$ Sec. 15, 37.11, the title is in either the canal trustees or to whom they sold it. There is no deed or record of the tract to any persons. Island Frac. of Sec. 16, is still in the State of Illinois, for use of, etc., of T. 37.11. If you wish me to go and see the records in canal commissioners' office, I can do so as soon as you send to me. I don't find that Roebuck has any title on Sec. 14, S. of river, or on the island. Please give inclosed to Tagerstrum. I have not yet been through examination of the abstract as to your title, but I think I will have time this week.

Yours,

J. G. VALLETTE."

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This letter amounts to a written statement by the defendant, that he was acting as the agent of the appellees in looking up the titles to various pieces of land including the forty-five acres, and also that he was acting as their attorney in examining for them the title which they already had. He states the result of his investigations as to the forty-five acres, and proposes to make further investigations at the office of the canal commissioners, if appellees shall send to him to do so. The appellee, Tedens, swears that he answered the letter of December 8, telling appellant to go ahead and visit the canal office and "look up the title there," and that he would be paid for his services. His testimony as to the contents of the answer was given after appellant's failure to produce it upon being notified to do so. Appellant denies that he received any reply to the letter of December 8.

Appellant sent to the canal office for information and obtained therefrom a paper, dated December 14, 1884, showing that the north fraction of the north-east quarter had been sold by the canal trustees to John B. Witt and that the certificate of purchase had been assigned to Peter Warden, and also showing that the forty-five acres had been sold by the trustees on September 11, 1848, to John B. Witt. Witt had died, and, in order to get title, it became necessary to obtain conveyances from his heirs.

On January 3, 1885, appellant again went to Lemont and continued the survey for appellees, which he had not finished in December. Appellee, Tedens, swears that, during this visit in January, appellant spoke of some of the heirs as being in Iowa and of some as living in Kansas, and expressed his intention of going to Kansas, as soon as he finished the survey he was then engaged in making. Appellant swears, that at this time in January he had no conversation whatever with either of the appellees about the forty-five acres, except that, when he and Thormahlen were at the land, he asked Thormahlen what it was worth and was told that its value was \$50

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or \$75 per acre. If the statement of appellee, Tedens, as to what took place when appellant was in Lemont on January 3, 1885, is true, then appellant led the appellees to believe that he was trying to obtain the title of the Witt heirs for them and not for himself. If his own statement is true, then he acted unfairly towards the appellees in concealing from them what he had learned from the canal commissioners on December 14, namely, that the title to the forty-five acres was not in Walker, but in John B. Witt or his heirs. That information was procured by him while acting as their agent and in pursuance of their employment, and should have been communicated to them. Instead of making them acquainted with the real condition of affairs, he went to work to procure the title for himself, while engaged in their service.

On January 5, according to his own evidence, he opened negotiations with the heirs for the purchase of their interest, and, by the second day of February, had procured conveyances from them to himself. On January 9, 1885, he sent the following letter to appellees:

"WHEATON, ILL., January 9, 1885.

"*J. H. Tedens & Co.:*

"GENTS—Do you want me to make abstract of lot 13, School Trustees Sub. of Sec. 16, 37.11? I think you had better only show title acquired by Edwin Walker, and it may be better to have full abstract made new, and show the full proceedings followed by your deeds, so as to show your full title in the whole business. I think it will pay you. Also, what will you give for the forty-five acres on the island, if I can get a title for you?

Yours very truly,

J. G. VALLETTE."

It is here apparent that appellant was acting as agent and adviser of the appellees, and was still holding out to them the idea that the title to the forty-five acres was to be obtained for them. They replied to his letter as follows:

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"LEMONT, ILL., January 17, 1885.

"*J. G. Vallette, Esq., County Surveyor, Wheaton, Ill.:*

"DEAR SIR—Our Mr. Tedens will call on you next Tuesday or Wednesday in regards examination abstracts and tracts and adjoinings you have surveyed for us. If not convenient for you to meet him on them days, please so inform us.

Yours, etc.,

J. H. TEDENS & Co."

Appellee, Tedens, swears, that, on January 21, 1885, he met the appellant at the office of Haddock, Vallette & Rickards in Chicago, and it was there agreed between them that appellant should acquire the title to the forty-five acres for the appellees, and that appellees should pay him for his services and disbursements in that behalf the sum of \$1000; that he, Tedens, then and there paid appellant \$50 upon the agreement so made. Appellant admits that he met Tedens at the office named on January 21 and had a conversation with him about the forty-five acres; that Tedens asked him how much he wanted for getting the title for them to the forty-five acres, and he replied: "I didn't know how much it was going to cost, but proposed to make \$1000 clear." Appellant also admits that he received the \$50, but claims that it was paid on account of the abstract he was going to make of the other lands, and not upon any agreement in reference to the forty-five acres; he says: "I told him (Tedens) I wanted \$50 to apply on it (the abstract), as I was going to spend considerable money—*as I was going out to see the Witts I wanted some money.*"

The conveyances from the Witt heirs to the appellant bear date February 2, 1885. After this in the month of February appellant had one conversation with Tedens in which he said: "I am still fighting for you," and another in which he said, in regard to the forty-five acres, that "he hadn't it ready yet," that "he hadn't it finished up yet," "it may take a suit yet to get it." Tedens states in regard to the latter interview: "I could not get much out of him at that time."

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On February 24, 1885, appellant had another interview with appellees at Lemont, and they there paid him \$30 and took the following receipt:

"LEMONT, ILL., Feb. 24, 1885.

"Rec'd from J. H. Tedens & Co., Lemont, Ill., thirty dollars for balance abstract making.

\$30.00.

J. G. VALLETTE."

This payment of \$30 was made in the store of appellees at Lemont and the above receipt with the exception of the word, "balance," and the signature, was written by a clerk of appellees, who was directed to draw it up by appellee Tedens. As at first drawn, it read: "Rec'd from J. H. Tedens & Co., etc., thirty dollars for abstract making." After the receipt was written, appellant inserted the word "balance" in such a way that its insertion was not noticed by Tedens. The purpose of putting in the word "balance" was evidently to confirm the theory, that the \$50, paid on January 21, had been paid for abstract making and not upon an agreement to obtain the forty-five acres.

Upon his direct examination appellant's testimony in regard to this receipt is as follows: "This is the receipt for the \$30, that was given me at their office for the last cash balance on abstract. Is that receipt just exactly as it was as you made it, as you signed it? Yes sir. And was it made there in Mr. Tedens' presence? It was. Who wrote it? Their clerk. *That is all his writing is it? All except my signature.*" Upon his cross-examination appellant testifies as follows: "Do you say that Mr. Tedens was present when you received \$30 from his clerk? Yes sir, because he went to the clerk himself and told him to pay it to me. Was he present when that receipt was signed for the \$30? I don't know whether he was or not. Did you direct that word? *I put that word in after it was written, that 'balance.'* After the receipt was written you wrote that word 'balance' there yourself? Yes sir, before I signed it. You do not know whether Mr. Tedens saw it or not? * * *

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I don't know whether he saw it or not. * * * You put the word 'balance' in there after it was written out and signed? I did," etc.

On February 28, 1885, the following letter was written to the appellant by the appellees:

"J. G. Vallette, Esq.

"LEMONT, ILL., Feb. 28, 1885.

"Yours at hand, and in reply can say that Peter Warden's address is Osburn City, Osburn Co., Kansas. He lives within three miles of Osburn City, on a farm.

"I will be in Chicago next Tuesday; would like to have the abstract there then, at Mr. Comstock's office.

Yours respectfully,

J. H. TEDENS."

The evidence tends to show what has already been stated that Walker had obtained his title to the one hundred acres, north of the channel, in the north-east quarter of section 15, from one of the Wardens, and it was supposed that he had also obtained from the same source the title to the forty-five acres in the north-east quarter of section 15 that lay south of the channel. The widow, Warden, was selling the timber upon the forty-five acres as far back as 1866, and, at that time, Tedens himself had drawn a contract between her and some other party in reference to the sale of such timber.

The letter of February 28 shows, that on that day appellant was still acting for the appellees in reference to the matter of title. It also shows, that, having already obtained the interests of the Witt heirs in the forty-five acres, he was preparing to get whatever interest the Wardens might have. At this time appellees were ignorant that he had obtained for himself the title of the Witt heirs and supposed that he was working to secure that title for them. He was not only concealing from them the fact that he had procured the Witt interest, but he was making use of them, so as to obtain from them such information as would enable him to get hold of the Warden interest. They did not learn until they were so informed in April,

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1885, by the county clerk of Du Page county, that the appellant had caused the conveyances of the forty-five acres to be made to himself, that he "had that property in his own name on record."

We forbear to refer further to the evidence. It is quite evident, that appellant acted unfairly towards the appellees while sustaining to them a confidential relation. The facts in this case bring it within the rule laid down in *Davis v. Hamlin*, 108 Ill. 39.

Appellant was the county surveyor of DuPage county, elected to that office by the people. Appellees extended to him a confidence, which they would not have felt but for his official position. By virtue of that position he came in contact with them and, while engaged in surveying their land, learned its situation and value, and became acquainted with their relations to the surrounding lands.

As a man, experienced in the examination of titles and engaged in the business of making abstracts of title, he was intrusted with their valuable papers and employed to ascertain whether there were any defects in their title. He undertook to help them collect their judgments by finding out what lands their judgment debtor owned and what sort of title he had to the same. Persons engaged in the business of making abstracts of title occupy a relation of confidence towards those employing them, which is second only, in the sacredness of its nature, to the relation which a lawyer sustains to his client. Such persons consult the evidences of ownership and become familiar with the chains and histories of title. They handle private title papers and become aware of whatever weaknesses or defects may exist in the legal proceedings, through which the ownership of real property is secured. They should be held to a strict responsibility in the exercise of the trust and confidence, which are necessarily reposed in them. Any abuse of such trust and confidence should be met with emphatic rebuke.

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Although it was shown upon investigation, that Walker had no record title to the forty-five acres, yet he had been in possession of it for many years and had exercised acts of ownership over it; appellees supposed him to be owner and employed appellant to ascertain the nature of Walker's interest, not with a view to speculation but for the purpose of subjecting that interest to the payment of honest debts. It was learned, that in 1848 the canal trustees had sold the property to one Witt, who had died, and whose heirs had gone off and abandoned the land. Appellees desired and expected by the purchase of the Witt interest to realize something towards the payment of their judgments. Appellant undertook and agreed to act for them as their agent in obtaining that interest. But his employment in this regard grew out of and followed from his previous employment to examine the titles to this and other tracts and to act for appellees in surveying land, in making abstracts of title and in pointing out, with a view of correcting, defects in title. He was not simply an agent to purchase, as in *Perry v. McHenry*, 13 Ill. 227, but his agency to purchase was part of a broader agency, that concerned other matters and involved greater confidence and a more delicate trust.

Appellant's relations to appellees were of such a confidential character and his conduct towards them was marked by such unfairness, that we feel justified in regarding him, as a trustee holding the forty-five acres in question for their benefit. The circuit judge took this view and we think the decree he rendered was correct.

The decree of the circuit court is accordingly affirmed.

Decree affirmed.

Syllabus. Statement of the case.

122 620
158 257**RICHARD MASCALL***v.***THE COMMISSIONERS OF DRAINAGE DISTRICT.***Filed at Ottawa November 11, 1887.*

1. **RIGHT OF TRIAL BY JURY**—*on appeal from assessment under Drainage law.* A land owner, on appeal to the county court from an assessment, under section 27 of the Drainage act, approved June 27, 1885, is entitled to a trial by a jury, if he demands one, on the question whether his land will be benefited by the proposed improvement, and if so, as to its extent.

2. **SAME**—*in the county court.* The practice and pleadings in all common law cases in the county court are made the same as in the circuit court in similar cases. In the trial of questions of fact in all common law cases in the latter court, either party is entitled to a jury.

3. **SAME**—*in the county court at a probate term.* In this case the appeal from the drainage assessment was to a probate term of the county court, which is allowable under the statute, and it was contended that, as there was no jury at a probate term, it was intended the judge, alone, should try the case. But the point was not well taken. The statute expressly provides, that “the court shall have the power to impanel a jury in any case cognizable at the probate terms, as well as at the law terms, whenever it shall be necessary for the trial of any matter pending before the court.”

APPEAL from the County Court of Henry county; the Hon. JOHN P. HAND, Judge, presiding.

The commissioners of the North Edwards Special Drainage District of Henry county, made an assessment upon the land of Richard Mascall, for drainage purposes. Mascall appealed to the county court, and in that court demanded a jury, which was refused. The case was tried by the court without a jury, and at a probate term.

The questions presented are, first, whether the land owner was entitled to a trial by jury on his appeal to the county court; and second, whether the fact that the appeal was to a probate term, would affect the question of the right of trial by jury at that term.

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Mr. CHARLES K. LADD, for the appellant.

Messrs. DUNHAM & FOSTER, and Mr. A. R. Mock, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The question here is, whether the land owner is entitled to a jury, on an appeal to the county court, under section 27 of the Drainage act, approved June 27, A. D. 1885. (Public Laws of A. D. 1885, p. 87.) That section provides, that "any party against whose land a tax has been thus levied, may, within ten days after the list has been deposited with the town clerk, appeal to the county court, by filing a bond, in double the amount of tax appealed from, in the county clerk's office; but the appeal shall be upon the ground, only, that such tax is a greater amount than the benefits to accrue to the land in question by the proposed drainage. Appeals taken to the county court, under the provisions of this act, may be heard at any term thereof, * * * and trial shall be conducted as in other cases of appeals. If the court finds that the tax exceeds the benefits to accrue, the court shall modify the same, so as to make it equal to the benefits, and the costs may be apportioned by the court, in its discretion."

What is meant by the words, "and trial shall be conducted as in other cases of appeal?" Counsel for appellee contend that a jury is not embraced within their meaning, and counsel for appellant contends that it is. To our minds it is clear the meaning is, that the trial shall proceed through the same steps and in the same way as in other cases of appeal,—in other words, that the appeal shall be tried precisely as other appeals are tried. Whether a jury is allowed or denied, affects the conduct of the trial, because it affects the manner of deciding questions of fact. We can not perceive that refusing to allow witnesses to be heard, or requiring the case to be tried with or without written pleadings, would any more be within the mean-

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ing of the word "conducted," in this connection, than is the allowing or refusing a jury. It is to be kept in mind that a jury is not a tribunal, but an element, simply, in a tribunal, and where a jury is an element in a tribunal, its impaneling, verdict, etc., are obviously but steps, and a part, only, of the steps, as the rulings of the judge in receiving the verdict, overruling motion for new trial, and rendering judgment upon the verdict, are other steps in the conducting of the trial, in the only sense in which, it would seem clear, the word "conduct" must have application to a trial. In such case, it would seem, the trial is conducted by the court by means or through the instrumentality of both judge and jury,—each performing, properly, a function of the court in the trial.

This then leads to the inquiry: How is a trial conducted in other cases of appeal to the county court? All other cases of appeal to the county court are to it as a law court. Its probate jurisdiction is all original. It is provided by section 7 of the act in relation to county courts, approved May 21, A. D. 1877, (Laws of 1877, p. 77,) that the county courts shall have concurrent jurisdiction with the circuit courts in all cases of appeals from justices of the peace and police magistrates. And section 177 (Rev. Stat. 1874, p. 343,) requires that the practice and pleadings in said court, in common law cases, shall be the same as in the circuit court in similar cases; and it can hardly be necessary to repeat, that in the trial of questions of fact, in all common law cases in the circuit court, each party is entitled to a jury. (Const. 1870, sec. 5, art. 2; *Ware v. Nottinger*, 35 Ill. 375; *Ross v. Irving*, 14 id. 171.) The maxim is: "*Ad quæstionem facti non respondent judices—ad quæstionem legis non respondent juratores.*" Broom's Legal Maxims, (4th ed.) 103, *77; Coke on Littleton, 155 b.

But it is argued that because the language is, "if the *court* finds that the tax exceeds the benefits, * * * the *court* shall modify the same, * * * and the costs may be apportioned by the *court*," a *jury* can not have been intended, for

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a jury has no discretion only in some special cases as to the quantity of damages, and that what the word *court* means in one place, it means in each of the others. This might be true if every time a court acted it must necessarily employ the same agencies; but this it does not do. The word *court* is, undoubtedly, often used in the sense of *judge*, and whenever the word *court* and the word "jury" are used in contradistinction to each other, it has that meaning, but in its general sense it means the tribunal by which justice is judicially administered. (Coke on Littleton, 58 a.) Thus, our constitution provides: "The judicial powers shall be vested in one *Supreme Court*, *circuit courts*, *county courts*," etc. (Sec. 1, art. 6.) *Circuit courts* shall have original jurisdiction of all causes in law and equity, etc. *County courts* shall be courts of record, and shall have original jurisdiction in all matters of probate, * * * and such other jurisdiction as may be provided for by law. (Secs. 12, 18, art. 6.) One *judge* shall be elected for each of the circuits. (Sec. 13, art. 6.) And there shall be elected in and for each county one *county judge*. (Sec. 18, art. 6.) The inviolability of the right of trial by jury, "as heretofore enjoyed," is guaranteed. (Sec. 5, art. 2.) But since all judicial power is invested in *courts*, it inevitably follows that a jury is an integral part of the court, in all cases where, at common law, there was the right of trial by jury.

It would then seem to be clear, that where, by this section, the *court* is required to act, it must depend upon the nature of the act what agency of the court is called into exercise. If it be to determine what is the fact on any question, the *jury* must act. If it be to declare what, in any case, is the rule of law, or what is the legal conclusion from facts found, the *judge* must act. But the finding of fact is just as much the act of the court, if permitted to stand, as is the legal conclusion thereon pronounced by the *judge*. Each is an indispensable part of a legal unit,—the judgment of the court. So, here, the *jury* must find the fact whether the property is benefited

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or not, and, if benefited, the amount. The amount of the tax assessed by the commissioners is not in issue,—their order fixing it. The judge then pronounces the conclusion of the law upon the verdict of the jury,—in other words, renders judgment thereon; if the verdict is that there are no benefits, then that no tax be assessed against appellant's lands; if it is that there are benefits, then that a tax be assessed against appellant's lands to the amount of such benefits, in no case exceeding, however, the amount of the tax assessed by the commissioners, and also that the costs be paid, as shall be equitable. Each step will thus be the act of the court, and meet the requirement of the statute.

It is further objected by counsel for appellees, that inasmuch as the appeal allowed is to any term of the county court, it may be to the probate term, at which there is no jury, and therefore it must have been intended that the judge, alone, shall hear the case. But the statute expressly provides, that "the court shall have the power to impanel a jury in any case cognizable at the probate terms, as well as at the law terms, whenever it shall be necessary for the trial of any matter pending before the court." (Rev. Stat. 1874, chap. 37, sec. 111.) The language of the statute in relation to applications for judgments for delinquent taxes is not analogous. That is an original, not an appellate, proceeding, and the statute gives full directions for the determination of the matter in a summary manner, and, by necessary implication, excluding the idea of a trial by jury. See sec. 191, *et seq.* of the Revenue act, Rev. Stat. 1874, p. 889.

We can not suppose that the General Assembly were in any degree influenced by a fear of the evils which counsel depict as likely to result from this construction, because precisely the same evils would result from the trial by jury of the same questions in special assessments for the improvement of streets, etc.; and yet, in such special assessments, the statute in express terms provides for impaneling a jury to pass upon the

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question of benefits. (Rev. Stat. 1874, sec. 31, *et seq.* p. 236.) So, also, under the Eminent Domain act, the question of damages and benefits is to be passed upon by a jury. Rev. Stat. 1874, p. 475.

If we felt any doubt upon this question, that doubt would be solved in favor of submitting the question of the amount of benefits, under the section before us, to a jury, because that construction best comports with the genius and spirit of our institutions.

The judgment is reversed and the cause remanded for a trial *de novo*, in conformity with the views here expressed.

Judgment reversed.

THE INDEPENDENT ORDER OF MUTUAL AID

v.

EMMA J. PAYNE.

Filed at Ottawa November 11, 1887.

1. ARREST OF JUDGMENT—*after demurrer to declaration is overruled.* After judgment overruling a demurrer to a declaration, there can be no motion in arrest of judgment for any defect in the declaration that could have been taken advantage of on the demurrer.

2. AMENDMENT of declaration—*after verdict—filing additional counts.* There is no error in allowing the amendment of the declaration after verdict, and pending a motion for a new trial, by the filing of additional counts upon the same cause of action upon which the suit was brought.

3. ESTOPPEL—*to deny fact admitted by a party's deed.* In an action against a benefit association, on a beneficiary certificate sealed with the company's seal and signed by its proper officers, which declares the deceased to be a member of the order in a certain lodge, the defendant will be estopped, by the recital in its deed, from showing that the lodge of the deceased was not properly organized.

4. EVIDENCE—*relevancy.* In an action of assumpsit upon a certificate of membership, against a mutual aid association, by the beneficiary of the deceased member, to recover the sum agreed to be paid on his death, the defendant pleaded the general issue and *non est factum*. On the trial the

40—122 ILL.

122	625
132	166
33a	249
122	625
133	548
122	625
37a	317
122	625
50a	587
52a	59
122	625
57a	286
57a	668
58a	195
122	625
60a	218
60a	264
122	625
68a	60
122	625
70a	553
122	625
173	102
122	625
81a	597
122	625
f188	*218
f188	*219
122	625
95a	*338
122	625
99a	*568
122	625
107a	*154

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defendant offered to prove that the lodge of which the deceased was a member, had not been properly organized, although it had received its charter, and, as a body, was acting under it, with the knowledge and sanction of the defendant association: *Held*, that the proposed evidence was not pertinent to the issues, under the pleas, and was irrelevant, as not tending to show any defence to the action.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of La Salle county; the Hon. CHARLES BLANCHARD, Judge, presiding.

Mr. A. J. HOPKINS, Mr. F. H. THATCHER, and Mr. N. J. ALDRICH, for the appellant:

The declaration charges that the sum of \$2000 was to be paid on certain conditions,—the due notice and proof of the death of Paine, and the surrender of the certificate,—none of which are alleged to have been performed. Without performance of these conditions no recovery can be had. 1 Chitty's Pl. 352; *Goodrich v. Van Nortwick*, 43 Ill. 445; *People v. Glann*, 70 id. 234.

The court erred in allowing the amendment to the declaration except upon just and reasonable terms. (Practice act, sec. 24.) Section 26 of that act contemplates that amendments shall be made before verdict.

The court erred in refusing to allow evidence showing that the lodge of the deceased had not been properly organized.

Mr. L. W. BREWER, and Mr. JOHN W. BLEE, for the appellee:

After demurrer to the declaration, the motion in arrest was too late. *Mix v. Nettleton*, 29 Ill. 245; *Express Co. v. Pinckney*, id. 245; *Coal Co. v. Hood*, 77 id. 68.

The declaration alleged proof of the death, and a readiness and willingness to surrender the certificate, and this was sufficient. *Life Ins. Co. v. Kellogg*, 82 Ill. 614.

As to the right to amend the declaration, see *McCullom v. Railroad Co.* 94 Ill. 534; *Insurance Co. v. Trust Co.* 1 Bradw. 391; *Drake v. Drake*, 83 Ill. 526.

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Mr. JUSTICE MULKEY delivered the opinion of the Court:

Emma J. Paine, the appellee, on the 17th day of April, 1886, recovered a judgment in the La Salle circuit court, against the Independent Order of Mutual Aid, for the sum of \$2499, and costs of suit. The action was assumpsit, brought on the following beneficiary certificate:

*"GRAND LODGE,
INDEPENDENT ORDER OF MUTUAL AID.*

No. 3596. { Printed Seal } of Grand Lodge } \$2000.

STATE OF ILLINOIS.

"This certificate, issued by authority of the Grand Lodge of Illinois, Independent Order of Mutual Aid, witnesseth:

"That Brother Lucius B. Paine is a member of this order, in Rising Star Lodge, No. 88, located at Earlville, in the State of Illinois, and entitled to all the rights and privileges of membership in the Independent Order of Mutual Aid, and to participate in the mutual aid fund of the order to the amount of \$2000, with accrued mutual aid assessments, upon due notice and satisfactory proof of his death, and the surrender of this certificate, legally received, which sum will be paid as a benefit, to his wife, Emma J. Paine, as he has directed in his application for this certificate:

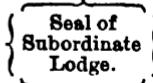
"*Provided*, this certificate is issued expressly in consideration that all the representations made by said Lucius B. Paine in his application and accompanying statements now on file in the office of the Grand Secretary are *true*, and that all lawful assessments shall be promptly paid, and that the said Lucius B. Paine shall, in every particular, comply with and abide by all the laws, rules and regulations of the order which now exist or which may hereafter be adopted by the Grand Lodge of the State of Illinois; and *provided further*, that the said Lucius B. Paine shall be in good standing in the order at the time of his death.

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In witness whereof, the Grand Lodge of Illinois
 has caused the Grand President to sign, and the
Grand Secretary to attest, these presents, and affix
hereto the seal of said Grand Lodge this 8th day
of January, 1881.

J. V. LANGLEY, *Grand President.*

Attest: ALEXANDER MCLEAN, *Grand Secretary.*

No. 3. Countersigned, sealed and delivered
 by the president and presiding secretary of
Rising Star Lodge, No. 88, I. O. M. A., this
11th day of January, 1881.

J. C. McDONOUGH, *President.*

JOHN D. Dow, *R. Secretary."*

A demurrer to the declaration having been overruled, the defendant interposed the plea of the general issue sworn to, and of *non est factum*. The cause was tried before the court and a jury with the result stated, upon the issues presented by these pleas. The judgment having been affirmed by the Appellate Court for the Second District, the defendant prosecuted an appeal to this court, and has assigned various errors on the record.

Some ten or eleven pages of appellant's brief are occupied in an effort to show that the circuit court erred in refusing to sustain appellant's motion in arrest of judgment, on account of the alleged insufficiency of the declaration, and this, notwithstanding the court had previously overruled a general demurrer to it. There is probably no principle of law more elementary in its character, or better established, than that such motion is not available under the circumstances stated. In 2 Tidd, 825, it is said: "After judgment upon demurrer, there can be no motion in arrest of judgment for any exception that might have been taken on arguing the demurrer." *American Express Co. v. Pinckney*, 29 Ill. 405, and *Quincy Coal Co. v. Hood, Admr.* 77 id. 68, recognize the same doctrine.

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The circuit court was therefore clearly right in overruling the motion.

After the verdict was in, and pending a motion for a new trial, the court permitted the plaintiff to file two additional counts to the declaration, and this is complained of and urged as a ground for reversal. The point is not well taken. It is manifest the defendant was not prejudiced by it. The only possible effect it could have had, was to so perfect the declaration as to enable the plaintiff to recover on the claim for which the action was intended to be brought, and this the court clearly had the right to allow to be done, by the express provision of the 24th section of the Practice act. Had the new counts been based upon some new cause of action, and evidence heard in support of them, quite a different question would be presented; but nothing of that kind is claimed, nor is there any ground for such a claim. The action was upon the contract set forth in the certificate, which the defendant had issued to the deceased husband of the plaintiff for her benefit, and the record shows conclusively that the recovery was upon that, and on nothing else.

Complaint is also made that the circuit court erred in refusing to admit testimony tending to show that the Rising Star Lodge was not fully organized at the time the certificate sued on was issued. This was but an attempt to attack the corporate existence of the Rising Star Lodge in a collateral proceeding. Without stopping to consider whether this, under any circumstances, would be permissible, it was clearly not so under the pleadings and facts in this case. The action was assumpsit, brought on a written certificate, sealed with the company's seal, signed by its president, and duly attested by its secretary, and on the face of which it is declared that "brother Lucius B. Paine (the plaintiff's husband,) is a member of this order, in Rising Star Lodge, No. 88, located at Earlville, in the State of Illinois," etc. As already seen, the only pleas interposed were those of *non assumpsit* and *non est*.

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factum. This simple statement of the facts affords two complete answers to the position of appellant: First, the defendant was, by its own deed, estopped from alleging that which it proposed to prove; second, the evidence offered was not pertinent to the issues raised by the pleas. Conceding the organization of the Rising Star Lodge to have been defective, as claimed, it would have afforded no answer to the action. It had received its charter, and, as a body, was acting under it, with the knowledge and sanction of the defendant. This was sufficient to bind the latter.

Other rulings of the court on questions of evidence are complained of, but the objections urged, we think, are without merit, and not of sufficient importance to require special notice. As to the court's rulings upon the instructions to the jury, we find nothing in them requiring a reversal of the judgment.

After a careful examination of the record, we have no doubt but that substantial justice has been done, and we are fully satisfied with the conclusion reached by the lower courts.

Judgment affirmed.

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30a	304
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122	630
134	541

122	630
35a	213
122	630
161	536
161	566

122	630
53a	280
55a	212
55a	388
56a	414

122	630
70a	377

122	630
77a	435

122	630
80	536

122	630
83a	683

THE GREAT WESTERN TELEGRAPH COMPANY, for use, etc.

v.

F. D. GRAY.

Filed at Springfield November 9, 1887.

1. *SUBSCRIPTION—to capital stock of corporation—contract construed, as to limited liability for amount subscribed.* A contract of subscription to the capital stock of a telegraph company provided that each subscriber should take the number of shares set opposite his name, and pay for the same in installments,—five per cent to be paid down, and the balance as the directors, from time to time, might order; and further provided that the company agreed that when forty per cent of the par value of the shares should be paid in, the number of shares subscribed by him should be issued to him as full paid stock of the company: *Held*, that the promise of the company to issue full paid stock upon the payment of the forty per cent,

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did not operate to limit the subscriber's liability to the payment of such per cent of the par value of the shares, but that the remaining sixty per cent might be collected after the issue of the stock: *Held*, also, that the words at the top of the subscription paper, "assessments not to exceed \$10 a share," could not in any way qualify the express promise to pay, in the body of the contract.

2. LIMITATIONS—*when the statute begins to run—as to subscription payable in installments, on call.* Where a contract of subscription to the capital stock of a corporation provides for payments in installments, as from time to time ordered by the board of directors, no cause of action will accrue until an installment is assessed and ordered to be paid.

3. A party in 1868 subscribed to the capital stock of a corporation, to be paid for in such installments as might, from time to time, be ordered, and on assessments or calls paid forty per cent of the par value of his stock. The directors failed to make any order for the payment of the balance, and a court of equity, at the suit of creditors, in 1886 made an order of assessment, or call for payment, on the subscription: *Held*, that the limitation as to the unpaid subscription did not commence to run before such order of the court in 1886.

4. PARTIES—in suit against corporation—to appoint a receiver, etc.,—whether stockholders are necessary parties. It is a well established general rule, that a court of equity acquires jurisdiction to appoint a receiver of corporate assets by service of process upon the corporation. The stockholder, unless so required by statute, is not a necessary party. His interest is represented by the presence of the corporation.

5. SAME—former decisions—distinguished. The cases of *Chandler v. Brown*, 77 Ill. 333, and *Lamar Ins. Co. v. Gulick*, 102 id. 41, holding it necessary to make a stockholder of a corporation a party before he could be bound by a decree winding up the corporation, were decided under section 25 of the act of 1872, relating to corporations, which required the stockholders to be made parties, and those cases not to be taken as authority to govern in any other case than in one under such a statute.

6. RECEIVER—power of court to appoint—to collect unpaid subscriptions. A court of equity has jurisdiction to appoint a receiver for a corporation when its board of directors are guilty of mismanagement and malfeasance, and order him, by suit in the corporate name, to collect unpaid subscriptions to the capital stock, by service of process, alone, on the corporation. And in an action so brought by him, the validity of the decree appointing the receiver can not be questioned by the defendant stockholder.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on writ of error to the Circuit Court of Lake county; the Hon. C. W. UPTON, Judge, presiding.

Brief for the Plaintiff in Error.

Mr. THOMAS J. SUTHERLAND, for the plaintiff in error:

The defendant, by the written contract, promised to take the number of shares, (100,) and to pay for the "same," which means the whole number of shares agreed to be taken. *Dingley v. Oler*, 117 U. S. 50.

The heading is no part of the contract, nor does what follows the words of promise contain any words limiting his contract liability, or in any way provide that he shall not pay what he has promised,—the par value of the shares subscribed. The words of his promise to take and pay for, are of the plainest, most positive and direct character. They are not open to construction, and must be taken as they read. Cooley's Const. Lim. p. 55, and cases cited; *People v. Wall*, 88 Ill. 78; *Laird v. Warren*, 92 id. 207.

The issue of shares as full paid stock can not amount to a release of liability for the other sixty per cent, nor change the character of the promise. *Railroad Co. v. Wellington*, 113 Mass. 87; *Upton v. Tribilcock*, 91 U. S. 45; *Miller v. Gravel Road Co.* 51 Ind. 51; *Erskine v. Peck*, 13 Mo. App. 280; 83 Mo. 465.

The release of the defendant's liability to the extent of sixty per cent, would, to the same extent, reduce the capital stock, which would have been illegal and against public policy, *ultra vires*, and void. *State v. Timkin*, 12 Am. and Eng. C. C. 24; *Zirkel v. Opera House Co.* 79 Ill. 334; *Bank of Commerce's Appeal*, 73 Pa. St. 59; *Life Ins. Co. v. Frear Stone Co.* 97 Ill. 537; *Melvin v. Insurance Co.* 80 id. 446.

The right of action did not accrue until after demand made under the order of the court. *Banet v. Railroad Co.* 13 Ill. 513; *Spangler v. Railroad Co.* 21 id. 276; *Cole v. Opera House Co.* 79 id. 96.

The circuit court having acquired jurisdiction, had the same powers as the board of directors had. *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, 91 id. 65; *Sanger v. Upton*, 95 id.

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56; *Insurance Co. v. Moore*, 84 Ill. 575; *Patterson v. Lynde*, 112 id. 205.

This company having been formed under the law of 1849, its rights and liabilities, and those of its stockholders, are to be treated as if the law of 1872 had never been passed. *Stevens v. Pratt*, 101 Ill. 219; *Wincock v. Turpin*, 96 id. 135.

The cases of *Chandler v. Brown*, 77 Ill. 333, and *Lamar Ins. Co. v. Gulick*, 102 id. 41, arose under section 25 of the act of 1872, and have no application here.

The stockholders were not necessary parties to the decree appointing the receiver. Morawetz on Private Corp. sec. 222; *Scoville v. Thayer*, 105 U. S. 143; *Glenn v. Williams*, 60 Md. 93.

Mr. ERIC WINTERS, for the defendant in error:

The contract of the defendant, therein set forth, is a limited contract, and provides for the payment, by defendant, of forty per centum of the par value of the shares subscribed for by him, (according to the orders of the board of directors,) and no more. He paid said forty per centum according to the orders of the board of directors of the plaintiff, and is not liable to pay any further or other sum.

The plaintiff's right of action against defendant on said contract is barred by the Statute of Limitations of the State of Illinois.

It does not appear, in and by the said declaration, that the defendant was a party to the suit or proceedings in the circuit court of Cook county, wherein the assessment was ordered. *Chandler v. Brown*, 77 Ill. 333; *Insurance Co. v. Gulick*, 102 id. 41.

Mr. CHIEF JUSTICE SHELDON delivered the opinion of the Court:

This was an action of assumpsit, brought by the Great Western Telegraph Company, for the use of Elias R. Bowen, receiver, to recover from the defendant the sum of \$875, being

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thirty-five per cent of the par value of one hundred shares of the capital stock of the plaintiff company, which the defendant had agreed to take and pay for. There was judgment for the defendant on a demurrer to the declaration, which judgment, on appeal, was affirmed by the Appellate Court for the Second District, and from that judgment of affirmance the plaintiff brings error.

There had been an order of assessment of this amount of thirty-five per cent made upon the stockholders of the company by the circuit court of Cook county, in a suit pending therein on the chancery side thereof, wherein the company was a party defendant, and wherein a receiver had been appointed for the company. The assessment was made by the court for the purpose of paying the debts due from the company, and after finding the amount of those debts, and the proper assessment to be made *pro rata* upon the stockholders for that purpose. Demand upon defendant had been duly made for the payment of this money before action brought. The unpaid balance on defendant's subscription was sixty per cent of the par value of the shares agreed to be taken by him. The declaration sets forth fully the above and other requisite facts, stating particularly the proceedings in said chancery suit, and giving a copy of the decree of assessment. The subscription paper signed by the defendant, as set forth in the declaration, is as follows :

"COPY OF CONTRACT AND ACCOUNT SUED ON.
Capital \$3,000,000; Shares \$25; Assessments not to exceed \$10 on a share.

Subscription List for the Capital Stock

OF THE

GREAT WESTERN TELEGRAPH COMPANY.

"*We, the subscribers hereunto, for value received, severally, but not jointly, agree to take the number of shares in the capital stock of The Great Western Telegraph Company placed opposite our respective names, and pay for the same in installments, to-wit:*

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five per cent on amount paid in, and the balance as the directors, from time to time, may order. In consideration thereof, the Great Western Telegraph Company agree, that when forty per cent of the par value of the shares shall have been paid under such orders, and the installment receipts therefor surrendered to the company, the number of shares severally subscribed by the undersigned shall be issued to them as full paid stock of said company.

"..... is appointed agent to solicit stock, and receive only the first installment of five per cent, (fifty cents on a share,) at the time of subscribing.

....., Secretary.

Names.	Residence.	Date of Subscription.	Number of Shares.
F. D. Gray.	Chicago.	June 11, 1868.	One hundred."

The declaration admits a payment of \$10 upon each share, and avers a balance unpaid of \$15 upon each share.

It is alleged by the defendant that the declaration does not state a good cause of action in three respects: First, that the contract of the defendant therein set forth is a limited contract, and provides for the payment, by the defendant, of forty per centum of the par value of the shares subscribed for by him, and no more,—that he paid said forty per centum, and is not liable to pay any further sum; second, that the plaintiff's right of action against defendant on said contract is barred by the Statute of Limitations; third, it does not appear, by the declaration, that the defendant was a party to the proceeding in the circuit court of Cook county, wherein the assessment was ordered.

The construction which defendant would place upon his contract, that the payment of forty per cent of the par value of the shares is a full compliance, and that, having paid such forty per cent, he is not further liable, is not admissible. Defendant's promise to take and pay the par value of the shares is clear and unqualified, and binds him for the payment. The company's promise, when forty per cent is paid to issue certificates for the shares as full paid stock, may well consist with

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defendant's promise to pay the par value of the shares, and the issuance of such certificates after the payment of forty per cent, may well consist with the liability remaining on the defendant to pay the other sixty per cent. Such promise of the company, then, does not operate to qualify that made by the defendant, and to limit his liability to the payment of forty per cent of the par value of the shares. To give it that effect it should have been expressly so declared. Nor, as we conceive, do the words at the top of the paper on which the contract is written, "assessments not to exceed \$10 on a share," assist to limit the liability of the defendant to \$10 on a share. Assuming those words as incorporated into the contract, whatever their meaning may be, we can not assign to them any such effect as to in any way qualify the express promise made by the defendant. In connection, and on the same line with those words, are also the words and figures, "capital \$3,000,000, shares \$25," showing no intention to reduce the capital stock nor the par value of the shares. In *Upton v. Tribilcock*, 91 U. S. 45, the stockholder had a certificate for the whole number of shares agreed to be taken, and the word "non-assessable," together with the amount, "\$100," were stamped across the certificate, although only twenty per cent had been paid; and yet the stockholder was held liable for the remaining eighty per cent.

There is nothing in the point as to the Statute of Limitations. Although the contract was made in 1868, it was to pay as the directors, from time to time, might order. The directors neglected to make order for the payment. A court of equity then might make the order in place of the directors. (*Scovill v. Thayer*, 105 U. S. 155; *Glenn v. Sexton*, 68 Cal. 353.) The order of assessment or call for payment made by that court was in 1886. Until then, as we view it, the cause of action did not accrue, and since then there has not been time for any period of limitation to run. *Scovill v. Thayer*, *supra*.

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The claim of the necessity that the defendant should have been a party to the proceeding in the circuit court of Cook county, to admit of this action against him, is rested upon the authority of the cases of *Chandler v. Brown*, 77 Ill. 333, and *Lamar Ins. Co. v. Gulick*, 102 id. 41. The former case was a suit by Chandler, receiver of the Lamar Insurance Company, against Brown, a stockholder in the company, to recover payment for his unpaid stock. The proceeding wherein Chandler had been appointed receiver and the order of assessment was made, was under section 25 of the act of 1872, relating to corporations, which provided that, in the contingency therein named, suits in equity might be brought against all persons stockholders at the time, by joining the corporation in such suit, and that each stockholder might be required to pay his *pro rata* share of the debts of the corporation, and the Lamar Insurance Company was being dissolved and wound up under that section. It was there said by the court: "It can hardly admit of argument, that to conclude a stockholder by a proceeding under this section, (25) it is indispensable that he should have been made a party thereto, as it provides. It is incumbent on the plaintiff to show clearly a legal right to institute and carry on the suit. To this end he should show his appointment (as receiver) by a decree which is conclusive as against the defendant. This he has failed to do. It nowhere appears, either by the recitals in the decree copied in the several counts or by distinct averment, that the defendant was a party to this proceeding." And why should he have been a party to that proceeding? Because, as had before been stated, the act so provides. The decision was one merely upon the construction of that section 25,—what it provided,—and is not to be taken as authority to govern in any other case than in one arising under that section. There was no purpose in that case to depart from the well established general rule, that a court acquires jurisdiction to appoint a receiver of corporate assets by service of process upon the corporation. The stock-

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holder is represented in his interest, as such, by the presence of the corporation. 2 Morawetz on Corp. sec. 822; *Ward v. Farwell*, 97 Ill. 593; *Glenn v. Williams*, 20 Md. 93; *Sawyer v. Upton*, 91 U. S. 56.

Lamar Ins. Co. v. Gulick, was a suit by this same Lamar Insurance Company, against a stockholder, to recover for unpaid stock, and the court, after stating that the defendant, not having been made a party to the suit wherein the receiver was appointed, or to the proceeding to procure an assessment, was not bound or affected by the orders therein, say: "A case exactly in point in principle, is *Chandler v. Brown*, 77 Ill. 333; and as it is conclusive of this view of the law, it will not be necessary to discuss it as a new question in this court." So that the *Gulick case* but followed and affirmed *Chandler v. Brown*, and goes to no further extent as an authority than that case, namely, to decide what is the requirement of section 25 of the law of 1872, as to making a stockholder a party in a proceeding under that section.

This Great Western Telegraph Company was organized in the year 1867, under the law of 1849, in relation to telegraph companies. The suit in chancery wherein this receiver, Bowen, was appointed, and this assessment made, was commenced in 1869, and has ever since been pending, so that it was not affected by the act of 1872, and the provisions of that act did not govern the proceedings therein.

The decisions, then, in *Chandler v. Brown* and *Lamar Ins. Co. v. Gulick*, do not apply here, and we do not regard the objection to the declaration, that it does not show that the defendant was a party to the proceeding wherein the assessment was ordered, as well taken. It is enough, under the general rule and the authorities above referred to, that the corporation was a party to that proceeding. That suit was brought by one Terwilleger and certain other persons, stockholders of the company, on behalf of themselves and all others similarly situated, against the company and others, as defendants. The decla-

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ration in the present case avers, and the order of assessment appearing therein sets forth, that the receiver was appointed in the said chancery suit of and for the company and all its property, on October 7, 1874, upon supplemental bill of complaint filed therein, and on account of the mismanagement and malfeasance of the then officers of the company; that the company was indebted to the extent of more than \$375,000, which indebtedness was in the form of judgments and decrees theretofore rendered against the company, and was duly proved by the creditors before, and found to be due by the court; that the company had no property, except the amounts remaining due upon stock subscriptions, with which any part of said indebtedness could be paid; that there were about two thousand stockholders of the company, widely scattered through more than twelve different States and Territories of the United States, and in other places, and it was therefore impracticable that all of the said stockholders should be made parties to that proceeding, and it was found that it was necessary and proper that thirty-five per centum of the par value of each share of the capital stock subscribed for by the stockholders should be called for and required to be paid by them for the purpose of paying the said indebtedness, and it was therefore ordered that a call or assessment of said amount of thirty-five per cent be made, that it be paid to the receiver, and the receiver was ordered to proceed at once to collect the sums so ordered to be paid, and to institute suits, in the name of the company, for the purpose of enforcing payments. This order was made on July 10, 1886.

There was here, then, a receiver appointed by a court of equity to collect the assets of the corporation for the benefit of its creditors. The unpaid part of defendant's subscription to the capital stock of the corporation was a part of such assets. The validity of the receiver's appointment can not be questioned in this collateral proceeding. The court had jurisdiction of the subject matter, and acquired jurisdiction to ap-

Opinion of the Court.

point the receiver by service of process upon the corporation. Defendant's promise was to pay as the directors, from time to time, might order. The directors, who were defendant's agents, having neglected to make order for payment, a court of equity, in their place, as before said, might make the order. The court here did make such order, and thereupon, or at least after demand made, defendant's legal liability upon his contract was complete to pay the remaining amount of his stock subscription. There was then a perfect cause of action against him. His liability was to pay the entire remaining unpaid amount of sixty per cent of his subscription,—at least to the extent needed to pay the debts of the corporation. Assessing him with only his ratable part thereof (thirty-five per cent) was, in mitigation of his legal liability, doing him an equity, and affording no just cause of complaint. In order for the board of directors to have made a valid order for payment, it would not be contended, we presume, that defendant should have been before the board. No more, we conceive, was it necessary that defendant should have been before the court, when it, in place of the directors, made the call or order of assessment.

We are of opinion the declaration shows a good cause of action, and that the demurrer to it was improperly sustained.

The judgments of the Appellate and circuit courts will be reversed, and the cause remanded to the circuit court.

Judgment reversed.

SCOTT, CRAIG and SHOPE, JJ., dissenting.

Syllabus.

HELEN M. MIX *et al.**v.*

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146	310
122	641
161	514

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa November 11, 1887.

1. FORMER ADJUDICATION—in the Supreme Court—what may be considered on a second appeal. Where a question either of law or fact has been decided by this court in a case properly before it, the same question can not be again raised in that case except upon petition for rehearing; and when a decree has been reversed, and remanded to the trial court with directions as to the decree to be entered, on a subsequent appeal errors can not be assigned for any cause that existed prior to the former decision in this court.

2. PRACTICE—after reversal and remandment—what proceedings allowable in the trial court. This court reversed a decree on bill to foreclose a lien on lands for taxes, and remanded the cause with directions to the circuit court to ascertain the amount of taxes due on each tract of the land, and enter a decree in conformity to the opinion pronounced: Held, that the circuit court, on the return of the case, had no authority to enter upon a general investigation of all matters and things which the defendants might desire to present, and that the court had but one duty to perform, which was to ascertain the amount due on each tract, and enter a decree in conformity to such finding. The validity of the assessments upon which the taxes were levied, and the legality of some of the taxes which were before the court on the former hearing, could not be again questioned.

3. ALLEGATIONS AND PROOFS—on bill to foreclose lien for taxes. A bill to foreclose a lien on land for taxes, alleged that the lands were forfeited to the State for the taxes for the years 1878 and 1879, giving a statement for each year, and then averred that "the full amount now due upon said lands and lots, as shown upon the collector's books of the year 1880, for taxes, penalties, interest and costs, including said forfeitures for the years 1878 and 1879, and accrued taxes for 1880, is the sum of \$3687.40," and that the amount which was a lien upon each tract and lot separately, is shown by said books, and said copy attached, opposite to each tract and lot, separately and respectively: Held, that such averment was sufficient to admit proof of the amount of taxes due and unpaid for the years 1875, 1876 and 1877, the collector's books (a copy of which was made an exhibit) being *prima facie* evidence of the amount of the taxes, and they being properly included in the taxes of 1880.

4. EVIDENCE—computation by county clerk of taxes due as shown by collector's books. On bill to foreclose a lien on lands for taxes of several years, the county clerk testified that he had, at the request of the State's

Brief for the Plaintiffs in Error.

attorney, examined the collector's books, and made a computation of the taxes due and unpaid, as shown by such books, and had prepared a paper showing the balance unpaid, which he, on request, attached to his deposition as a part thereof: *Held*, that there was no valid objection to the evidence, it being a tabulated statement from the books. If there was any error or mistake in the statement of the clerk, it might be shown on cross-examination.

5. ERROR WILL NOT ALWAYS REVERSE—*refusal of change of venue—ground of application obviated*. The error, if any, in overruling a motion for a change of venue on account of the prejudice of the judge of the court, is rendered harmless by the case being tried by another judge of the same court. An error working no harm is no ground of reversal.

WRIT OF ERROR to the Circuit Court of Kankakee county; the Hon. ALFRED SAMPLE, Judge, presiding.

Mr. WILLIAM POTTER, and Mr. STEPHEN R. MOORE, for the plaintiffs in error:

A part of the taxes for each year was for the payment of bonds of the towns illegally issued to one Young, and there is no rightful authority to collect such taxes. *Town of Middleport v. Life Ins. Co.* 82 Ill. 562; *People v. Jackson County*, 92 id. 441; *English v. People*, 96 id. 566.

When a portion of the tax is illegal for which judgment is entered, the judgment is void. *Blackwell on Tax Titles*, 192; *McLaughlin v. Thompson*, 55 Ill. 249.

The answer shows that this property was taxed willfully, fraudulently and corruptly, greatly in excess of other like property. The principles of equality and uniformity are indispensable to all legal taxation. *Const. art. 9, sec. 1; City of Chicago v. Larned*, 34 Ill. 203; *People v. Bradley*, 39 id. 130; *Ottawa v. Spencer*, 40 id. 211; *Holbrook v. Dickinson*, 46 id. 285; *Darling v. Gunn*, 50 id. 428; *Bureau County v. Railroad Co.* 44 id. 229; *Boone County v. Railroad Co.* id. 242; *Merrill v. Humphrey*, 24 Mich. 170; *Gage v. Evans*, 90 Ill. 569; *Cooley on Taxation*, 157, and cases cited in note.

The court improperly entered a decree for taxes not named in the bill, and also erred in refusing to allow the defendant

Brief for the Defendants in Error.

to prove that the lands and lots were not his, and were wrongfully assessed in his name.

The defendant also offered to show that the village tax, and the tax levied by the commissioners of highways, were illegal, and that the State's attorney had no authority to file this bill, which the court refused.

The court erred in admitting in evidence the written statement of Kenaga, prepared at the instance of Mr. Starr, in the absence of the plaintiffs in error, and without their knowledge. *Railroad Co. v. O'Brien*, 119 U. S. 99.

The decree is too large, and can not be sustained, and there was error in refusing the change of venue. *Walsh v. Ray*, 38 Ill. 30.

Mr. C. R. STARR, for the defendants in error:

This court, in its judgment when the case was before it, decided most of the questions now sought to be re-investigated, and held, on the cross-errors, that the People were entitled to a decree for all the taxes due after giving plaintiffs in error credit for all they had paid.

The defendants did not press their petition for change of venue, at the December term. At the April term, Judge Sample, by request, and by unanimous consent, comes on to pass upon the master's report, as that is all that remains to be done in the case.

The whole case had been tried before the Hon. O. T. Reeves, as the former record will show, and as shown by the reported case, and, under the decisions of this court, he would have been justified in refusing a change of venue, the application coming too late. *Crane v. Crane*, 81 Ill. 170; *Richards v. Greene*, 78 id. 526.

This court has decided that the allegations in the bill were sufficient to authorize the foreclosure, not only for the taxes and forfeitures incurred for the year 1879 and previous years, but also for the taxes shown by collector's books to be due for

Opinion of the Court.

the year 1880. The law makes the collector's books *prima facie* evidence of the taxes due against the lands.

The point is made that the master got the clerk to help make up the computation, and presented a paper in which he had put all these taxes, interest, forfeitures and costs. We suppose it would be impossible, almost, for one not familiar with the books, to go over the matter and make a correct computation. It is a common practice for witnesses to make a computation for the jury, and for witnesses, the clerk or master to compute for the court. It is done under oath, and the tribunal that is to pass upon the question, adopts it, and finds accordingly.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, to foreclose a lien on certain lands in Kankakee county for taxes, under section 255 of the Revenue law. (2 Starr & Curtis, p. 2110.) A decree having been rendered, the defendants in the bill sued out a writ of error, which was heard at our September term, 1885. On that hearing, various questions were presented and considered, and the decree of the circuit court was reversed, with directions to ascertain and fix the amount due against each tract of land to be embraced in the decree of foreclosure, and to render such decree in conformity to the opinion. (See *Mix v. The People*, 116 Ill. 265.) It will be seen, by an examination of the opinion in the case cited, that the rights of the parties on the former hearing were settled, and there was but little left for the circuit court to do when the cause should be re-docketed in that court. A remanding order having been filed in the circuit court, the cause was placed on the docket, and a reference had to the master in chancery to ascertain and report to the court the amount remaining unpaid on each tract of land, after allowing, as a credit, whatever amount had been paid on each tract. The evidence was produced before the master, and he made a

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report to the court, showing the amount due on each tract of land, after deducting such sum or sums as had been paid. The report was approved, and a decree entered in conformity to the prayer of the bill. To reverse that decree this writ of error has been sued out.

In the argument, plaintiffs in error attempt to raise and re-argue questions which were presented and disposed of when the case was before us on the former writ of error. This can not be done. We had occasion to consider this question in *Manufacturing Co. v. Wire Fence Co.* 119 Ill. 31, and it was there held: "Where a question, either of law or fact, has been decided in a case properly brought before it, the same question can not be again raised in that case, except upon petition for rehearing." In the case cited, it was also held, that where a case has been heard in the trial court, reviewed in this court, and remanded to the trial court with directions as to the decree it shall enter, on a subsequent appeal to this court errors can not be assigned for any cause that existed prior to the former decision in this court. The questions, therefore, attempted to be raised in regard to the validity of the assessments of the property, and the legality of portions of the taxes, were before the court on the former hearing, and the decision then rendered is conclusive of them and all other questions which were properly before the court on the former writ of error.

It will be observed that when the cause was here before, it was remanded, with directions to the circuit court to ascertain the amount due on each tract of land, and render a decree in conformity to the opinion. Under this order the circuit court had no power or authority to enter upon a general investigation of all matters and things which the defendants might desire to present for consideration, but, on the other hand, as the opinion so provided, complainants had the right to dismiss the bill as to any particular tract of land they might consider advisable, and after this was done, the court had but one further duty to perform, and that was to ascertain the amount

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due on each tract of land, and enter a decree according to that finding. It is therefore plain that the only question that arises on this record is, whether, in ascertaining the amount due and entering the decree, the court has committed error. If it has, these errors may be corrected; but if no error has been committed in this regard, the decree will have to be affirmed. We will therefore proceed to consider the errors complained of which occurred in determining the amount due on each tract of land; and, first, it is said that the court gave a decree for taxes of 1875, 1876 and 1877, not embraced in the bill.

The averment of the bill is, "that the said lands and lots were forfeited to the State of Illinois for the taxes of the year A. D. 1878 and for the year 1879," and then follows a statement for each year separately, and then proceeds: "And the full amount now due upon said lands and lots, as shown upon the collector's books of the year 1880, for taxes, penalties, interest and costs, including said forfeitures for the years 1878 and 1879, and accrued taxes for 1880, is the sum of \$3687.40." And the amount which was a lien upon each tract and lot, separately, is shown by said books, and said copy attached, opposite to each tract and lot, separately and respectively.

It is no doubt true, as suggested in the argument, that complainants, on a recovery, are confined to the case made by the bill. But we think the allegations of the bill are sufficient to admit proof of the amount of taxes due and unpaid for the years 1875, 1876 and 1877. The statute under which the bill was filed, provides that the amount due on the collector's books, against the property, shall be *prima facie* evidence of the amount of taxes against the real property. As said before, the bill alleges that the sum due is \$3687.40, and the amount which was a lien upon each tract and lot, separately, is shown by said books. A copy of the tax books is attached to the bill as an exhibit, and made a part thereof. Under these allegations, the complainants were not confined to taxes of 1878, 1879 and 1880, but they might with propriety show the amount due and

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unpaid for prior years, as shown by the tax books. But aside from this view, if the taxes of 1875, 1876 and 1877 were not paid, under the provisions of section 229 of the Revenue law such taxes would be carried forward each year, and thus would become a part of the tax of 1878 and 1879, which, it is conceded, may be recovered under the bill.

It is also insisted that the court erred in excluding evidence offered by the defendants on the hearing, and in sustaining the master's report excluding evidence offered by the defendants. Without going over this evidence in detail, it is sufficient to say, that no part of the offered evidence had any bearing on the issue involved in the case, which the circuit court was directed to determine under the remanding order of this court, and upon this ground the offered evidence was properly rejected.

William F. Kenaga, who has been acting county clerk of the county since 1877, was called as a witness for the complainants, and was asked if he had made a computation of the taxes due and unpaid, as shown by the collector's books of the towns of Momence and Ganeer, for 1880. In answer, the witness stated that he had a paper which showed the balance unpaid. The witness was then requested to present the paper he had prepared, to the master, and make it a part of his deposition, which he did. The testimony thus offered, it is insisted with much confidence, was inadmissible. We see no objection to the evidence. It was a tabulated statement from the books, prepared by the clerk, and if he had made any mistake, or committed any error, a proper cross-examination, which the defendants had the right to make, would have corrected any and all errors the clerk may have made. The fact that the statement was prepared under the direction of the solicitor of complainant, was a matter of no moment. If it was accurate and correct, it was proper for the consideration of the court, in connection with the testimony of the clerk, notwithstanding complainant's solicitor may have requested the clerk to prepare the statement.

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It is next claimed that the decree exceeds the real amount due, \$346.44, and hence is erroneous. The defendants make out this excess by claiming payments on the taxes, amounting to \$2042.42. If this amount had been actually paid on the taxes against the lands embraced in the decree, the position of the defendants might be well taken; but such was not the case. The \$2042.42 represents the entire amount paid by defendants on the taxes against the lands named in the bill as it was first prepared. Before the decree, however, the bill was dismissed as to a portion of the lands, and in arriving at the amount of credits, the defendants could properly claim whatever sum had been paid on any tract or tracts dismissed out of the bill, and to be deducted from the total amount paid,—to-wit, \$2042.42. If this course is pursued in the computation, we think the amount of the decree will be found correct, or at least not excessive.

After the cause had been remanded, and on the 21st day of April, 1886, it was referred to the master. While the cause was pending before the master, on December 7, 1886, one of the defendants filed a petition for a change of venue, on the ground that the presiding judge, O. T. Reeves, was prejudiced against the petitioner. On the 30th day of December, 1886, the master's report was filed, but no steps seem to have been taken in regard to the motion to change the venue, until the April term of court, 1887, when the motion was overruled, but the cause was referred to one of the other judges of the circuit for trial, who being present, proceeded with the trial of the cause. The decision of the court overruling the motion for a change of venue, is relied upon as error. The only object of the petition was to take the cause from Judge Reeves. That was accomplished as effectually as if an order had been made changing the venue of the cause. The defendants obtained all they desired,—the trial of the cause before an unprejudiced judge. That they obtained, and they have no ground whatever for complaint. Whether the decision on the motion

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was right or wrong, is a matter of no moment. The defendants were in no manner injured, and it is a familiar rule that an error that does no harm is not a ground for reversing a decree.

Perceiving no error in the record, the decree will be affirmed.

Decree affirmed.

JOHN KENNEDY *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa September 26, 1887.

192	649
131	599
122	649
35a	66
122	649
67a	236
122	649
181	490

122	649
198	5144
122	649
108a	1304

1. **IMPRISONMENT FOR DEBT**—constitutional exemption—*limited to contracts*. The constitutional provision prohibiting imprisonment for debt, applies to actions on contracts, express or implied. As to the debts thereby intended, there must be the relation of debtor and creditor. The prohibition does not extend to actions for torts, nor to fines or penalties arising from a violation of the penal laws of the State.

2. Section 14 of division 14, chapter 38, relating to crimes, etc., which authorizes a commitment to the county jail for the payment of a fine and costs, is not in contravention of the constitutional provision prohibiting imprisonment for debt. The costs in a criminal prosecution is not a debt, within the meaning of such provision.

3. **JURISDICTION**—assault—*circuit courts and justices of the peace*—prosecution by indictment. Circuit courts have original jurisdiction in all cases of misdemeanors, which includes assaults, and all offences cognizable in such courts may be prosecuted by indictment.

4. The fact that the statute gives to justices of the peace jurisdiction in cases of assault, does not give them exclusive jurisdiction thereof. They can not be vested with exclusive jurisdiction under the present constitution.

5. **CRIMINAL LAW**—*conviction of a less offence than charged*. Where a person is put upon trial for a crime which includes an offence of an inferior degree, the jury may acquit of the higher offence and convict of the lesser, although there may be no count in the indictment specifically charging the lesser offence. So when one is indicted for an assault with a deadly weapon, with intent to inflict a bodily injury, etc., he may be convicted of a simple assault.

6. **COSTS**—in criminal cases—where there are several defendants. Each of several defendants convicted of a criminal offence is liable for the costs

Brief for the Plaintiffs in Error.

made by the People in procuring his own conviction, and when two are convicted on a joint charge, they are severally liable for all the costs made by the prosecution in procuring their several convictions.

7. So where three persons are tried together, and one is acquitted and two convicted of an assault, and fined, and ordered to stand committed to jail until the fines and costs are paid, those so convicted will be required to pay only the costs of their own conviction, and not the costs of the one acquitted.

WRIT OF ERROR to the Circuit Court of Lee county; the Hon. J. M. BAILEY, Judge, presiding.

Messrs. W. & W. D. BARGE, for the plaintiffs in error:

That part of the statute, (chap. 38, sec. 512,) which authorizes the committing of the offender to jail until the costs are paid, is unconstitutional.

The costs are not imposed on the party as a punishment, but are a matter of private right,—a debt due to those entitled to receive them. *State v. Farley*, 8 Blackf. 229; *Thompson v. State*, 16 Ind. 516; *Ex parte McDonald*, 2 Whart. 440; *County of Schuylkill v. Reifsnnyder*, 46 Pa. St. 446; *Playford v. Commonwealth*, 4 id. 144.

An assault is the lowest crime known to the law. The People's costs are \$927.25, the defendants', \$224.09,—in all, \$1151.84; and if costs are of the nature of a fine, or a part of it, the punishment is excessive, and in conflict with the bill of rights. Const. 1870, art. 11, sec. 11; Cooley's Const. Lim. *328, 329.

The judgment fixes no limit to the time of imprisonment, and is therefore void. *Queen v. Green*, Fort. 274; *Hurd on Habeas Corpus*, 335; *Gurney v. Tufts*, 37 Maine, 130; *Howard v. People*, 3 Mich. 207; Rev. Stat. chap. 38, sec. 278.

An assault is not an indictable offence so as to bring it within the rule allowing a conviction of a lesser under an indictment for a greater offence. *Carpenter v. People*, 4 Scam. 197; *Severin v. People*, 37 Ill. 414; *Ferguson v. People*, 90 id. 510; *Freeland v. People*, 16 id. 380.

Brief for the People.

The defendants, when convicted, are severally liable for all the costs made by the People in procuring their several convictions, but not for the costs of each other, or for separate costs made by the People against their co-defendant, who was acquitted. *Moody v. People*, 20 Ill. 319; *Murphy v. People*, 3 Col. 147; *Commonwealth v. Ewers*, 4 Gray, 21.

Mr. C. B. MORRISON, and Mr. W. P. BRIGGS, for the People:

The provision of the constitution prohibiting imprisonment for debt, does not apply to actions for tort, but to actions *ex contractu* alone. *McKindley v. Rising*, 28 Ill. 343; *People v. Brennan*, 14 id. 414; *Rich v. People*, 66 id. 513; *Kanouse v. Lexington*, 12 Bradw. 318; *Brown v. People*, 19 Ill. 613; *People v. Foster*, 104 id. 156.

Payment of costs may be compelled by commitment. *Hill v. State*, 2 Yerg. 247; *Ex parte Bollig*, 31 Ill. 88; *Downing v. Herrick*, 47 Maine, 463; *Sheeley v. Life Ins. Co.* 2 B. C. (N. S.) 211; *Keefhover v. Commonwealth*, 2 Pa. 240; *In re Howard*, 26 Vt. 205; *Nelson v. State*, 46 Ala. 186; *Thompson v. State*, 16 Ind. 516; *Ex parte Tongate*, 31 id. 370; *Caldwell v. State*, 55 Ala. 133; *Riley v. State*, 16 Conn. 47; *State v. Wallace*, 41 Ind. 445; Bishop on Crim. Proc. sec. 1321.

A law authorizing imprisonment for costs in a criminal case, is not unconstitutional. *United States v. Walsh*, 1 Abb. (U. S.) 66; *Morgan v. State*, 47 Ala. 34; *Matter of Ebenhack*, 17 Kan. 618.

The circuit court has jurisdiction of all crimes and misdemeanors. *Young v. People*, 6 Bradw. 484; *Wilson v. People*, 94 Ill. 426.

Defendants convicted are severally liable for all the costs made by the People in procuring their conviction. *Moody v. People*, 20 Ill. 319.

The judgment does not require the payment of the costs of the defendant who was acquitted.

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Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

Plaintiffs in error were jointly indicted with their brother, James Kennedy, at the October term of the Lee county circuit court, A. D. 1884, for an assault with a deadly weapon upon one James Minnihan. After new trial granted the case was tried a second time at the September term, 1886, of the same court. Plaintiffs in error were found guilty of an assault, and James Kennedy was found not guilty.

The judgment of the court was that John Kennedy pay a fine of \$40; that Daniel Kennedy pay a fine of \$25, and that they "pay the costs of this proceeding to be taxed by the clerk of this court, and that they stand committed to the common jail of said Lee county until said fine and costs are paid."

The statute of this State, under which this judgment was rendered, is as follows: "When a fine is inflicted, the court may order, as a part of the judgment, that the offender be committed to jail, there to remain until the fine and costs are fully paid or he is discharged according to law." Rev. Stat. 1885, chap. 38, sec. 452; div. 14, sec. 14.

Counsel for plaintiffs in error urge a reversal, on the ground that the provision of the statute here quoted is in conflict with section 12 of article 2 of the constitution of this State, which says that "no person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud." It is claimed that the *costs* of the proceeding are a debt due to the officers of the law, and that, therefore, plaintiffs in error could not be imprisoned until such debt was paid.

We have held that the prohibition of the constitution applies to actions upon contracts, express or implied. Its design is to relieve debtors from imprisonment, who are unable to perform their engagements. They are exempt from arrest, if they act in good faith towards their creditors. The prohibition does not extend to actions for torts, nor to fines or penalties arising

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from a violation of the penal laws of the State. It has reference to debts arising *ex contractu*. (*People v. Cotton*, 14 Ill. 414; *McKindley v. Rising*, 28 id. 337; *Rich v. People*, 66 id. 513.) In the latter case it was said: "As to the debts intended to be embraced there must be the relation of debtor and creditor."

The liability of a convicted party to pay the costs in a criminal proceeding does not arise out of an implied contract. The costs are fixed by the statute. They are the creature of the law. They are incident to the prosecution of the proceeding and grow out of it. They follow the judgment and are a part of it.

This precise question was before the Supreme Court of Alabama in *Morgan v. The State*, 47 Ala. 34. In that case the appellant was convicted of assault and battery and fined, and "judgment was rendered for the fine and the cost of the prosecution" under a statute, which provided that, "if the fine and costs are not paid, etc., the defendant must either be imprisoned in the county jail, or, at the discretion of the court, sentenced to hard labor for the county," etc. Appellant paid the fine, but refused to pay the costs and was thereupon sentenced. The court there say: "Counsel insists * * * that the cost in such case is a debt, and the constitution declares 'that no person shall be imprisoned for debt.' In this the counsel is mistaken. In criminal cases, the cost is no more a debt than the fine, and, accurately speaking, not as much so, for the fine is a sum certain *in numero* and the cost is not." *Caldwell v. The State*, 55 Ala. 133; *Hill v. The State*, 2 Yerg. 247; *Downing v. Herrick*, 47 Me. 462; *Sheehy v. Professional Life Ins. Co.* 2 C. B. 211,—89 Eng. Com. Law; *Ex parte Howard*, 26 Vt. 205; *County of Schuylkill v. Reifsnyder*, 46 Pa. St. 446; *United States v. Walsh*, 1 Abb. (U. S.) 66.

In *Brown v. People*, 19 Ill. 613, it was said: "The only question in this case is whether a justice of the peace, who has imposed a fine for a contempt of his court, can imprison the party till the fine and costs are paid. Of this power we have no doubt. * * * It was within the power of the justice and

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it was his duty to imprison the party guilty of the contempt, till the fine and costs were paid." *Ex parte Bollig*, 31 Ill. 88.

Bishop in his work on Criminal Procedure (vol. 1, sec. 1321, 3d ed.) says:

"It is a familiar practice in civil causes, that costs taxed against a defendant of whom damages are recovered, become 'parcel of the damages,' enforceable in the same way with the rest. Hence, by analogy, as one ordered to pay a fine or provide sureties of the peace is by the sentence ordered to stand committed until he complies, so should be one condemned to pay costs as a part of his punishment. It is so in perhaps the greater number of the States. In others this order is deemed unauthorized." See also *People v. Foster*, 104 Ill. 156; *Matter of Ebenback*, 17 Kan. 618.

We are of the opinion that the statute complained of is not unconstitutional. It can work no hardship as section 455, chapter 38 of the Revised Statutes provides, that, whenever it is made satisfactorily to appear to the court, after all legal means have been exhausted, that any person, who is confined in jail for any fine or costs of prosecution, for any criminal offence, hath no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of the court to discharge such person, etc.

The indictment in this case contained four counts. The first count charges an assault with a deadly weapon, "the kind, nature or further description of which is to the said grand jurors unknown," with the intent to inflict upon the person of William Minnihan a bodily injury, no considerable provocation then and there appearing. Rev. Stat. chap. 38; div. 1, sec. 25.

The second count is the same as the first, except that each of the parties indicted, to-wit: the plaintiffs in error and James, Kennedy, are charged with making the assault, "each with a deadly weapon to-wit: a sharp piece of metal, a further description of said deadly weapons or either of them is to the said grand jurors unknown."

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The third and fourth counts use the words, "the circumstances of the assault showing abandoned and malignant hearts," and omit the words, "no considerable provocation appearing." The third describes the assault as being made "with certain deadly weapons, the number or a description of which is to the said grand jurors unknown." The fourth describes the assault as being made "with certain sharp-edged deadly weapons the number of which or a further description of which said deadly weapons is to the grand jurors unknown."

The verdict of the jury found the plaintiffs in error guilty of an assault. It is claimed, that they could not be convicted of an assault under the indictment.

An assault is a misdemeanor. Circuit courts have original jurisdiction in cases of misdemeanor. (*Young v. People*, 6 Bradw. 434; *Wilson v. People*, 94 Ill. 426.) All offences cognizable in said courts are prosecuted by indictment. (Rev. Stat. 1885, chap. 38, sec. 349, div. 10, sec. 3.) Where a party is put on trial on an accusation which includes an offence of an inferior degree, the jury may acquit of the higher offence and convict of the lesser, although there may be no count in the indictment specifically charging the lesser offence. (*Carpenter v. People*, 4 Scam. 197; *Beckwith v. People*, 26 Ill. 500.) "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Rev. Stat. chap. 38, div. 1, sec. 20.) It is an offence of a lesser degree than that charged in the indictment and is embraced in the terms of the indictment.

Wharton on Crim. Pl. and Pr., (8th ed.) secs. 246 and 247, says: "Generally speaking, where an accusation includes an offence of an inferior degree, the jury may discharge the defendant of the high crime and convict him of the less atrocious; and, in such case, it is sufficient if they find a verdict of guilty of the inferior offence and take no notice of the higher. * * * Illustrations are to be found in indictments for * * * assault with intent to kill or ravish or to do other illegal acts,

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where the defendant may be convicted of assault alone." "Under an indictment for assault with intent, he may be convicted of a simple assault." *Id.* sec. 465.

In Wharton on Crim. Law, (vol. 1, secs. 640 a, 641 a, 645 b,) it is said: "An assault with intent to commit a felony is, at common law, only a misdemeanor. Hence, as the grade of the offence is the same as that of a simple assault, the averments of felonious intent can be stricken out and a conviction had for assault." *State v. Scott*, 24 Vt. 127; *State v. Coy*, 2 Aik. 181; *Hunter v. Commonwealth*, 79 Pa. St. 503; *Canada v. Commonwealth*, 22 Gratt. 899; *State v. Waters*, 39 Me. 54; *State v. Johnson*, 30 N. J. 185; *Francisco v. State*, 24 id. 30; *State v. Bowling*, 10 Humph. 52; *Commonwealth v. Fischblatt*, 4 Metc. 354; *Lewis v. State*, 33 Ga. 131.

Counsel have furnished no abstract of the evidence, but we have examined it as it is set forth in the record, and think that the jury would have been warranted in finding the plaintiffs in error guilty of such an assault as is described in the indictment. The fact that the statute gives to justices of the peace jurisdiction in cases of assault does not give them exclusive jurisdiction thereof. (Rev. Stat. chap. 38, div. 9, sec. 1.) They could not be vested with such exclusive jurisdiction under the present constitution. We think that the defendants could be convicted of an assault under the indictment.

Each of the plaintiffs in error was liable for the costs made by the People in procuring his own conviction. The defendants, when convicted, are severally liable for all the costs made by the prosecution in procuring their several convictions. (*Moody v. People*, 20 Ill. 315.) We think the plaintiffs in error were only required by the judgment to pay the costs of their own prosecution and not the costs of James Kennedy who was acquitted.

The judgment of the circuit court is affirmed.

Judgment affirmed.

Syllabus.

ELIPHALET W. BLATCHFORD *et al.*

v.

N. B. BOYDEN, for use, etc.

Filed at Ottawa November 11, 1887.

1. PARTIES—in replevin. Where goods levied on under an execution are replevied, the officer having their legal custody is the proper person to be made a defendant. The plaintiffs in the execution are not necessary, or even proper, parties to the suit.

2. REPLEVIN—to whom property is to be returned on writ of *retorno habendo*. Where goods levied on by a sheriff, and held by him under an execution, are taken from his custody by writ of replevin, they can be rightfully returned to him alone upon a writ of *retorno habendo*. The plaintiffs in the execution having never had the goods in possession are not entitled to have return thereof made to them, but they must be returned to the sheriff, to be applied in satisfaction of the execution in his hands.

3. ALLEGATIONS AND PROOFS—in suit on replevin bond—as to identity of person for whose use the suit is brought. In replevin against a sheriff for goods levied on by him under an execution, the bond is properly made to the coroner, and, upon condition broken, that officer may sue thereon for the use of any person damaged by the wrongful suing out of the writ, or by the failure of the plaintiff to return the property as awarded. And when the plaintiff in execution is also made defendant in replevin, and named as a defendant in the replevin bond, he may be joined as one in use with the sheriff; but the right to enforce the entire liability being in the sheriff, the plaintiff in execution being joined as defendant in the replevin suit, or as a usee in the suit on the bond, can in no way affect the sheriff's right of recovery, or add to the liability of the obligors in the bond, and hence describing such plaintiff in execution as the assignee of a wrong person will not defeat a recovery or afford ground to exclude the bond.

4. A sheriff levied an execution in favor of A, as assignee of the estate of B, upon goods, when a third person replevied the same in an action against the sheriff, and A, as assignee of the estate of C, who was described in the same way in the replevin bond: *Held*, that in an action on the bond, by the coroner, for the use of the sheriff, and A, assignee of the estate of B, the coroner might, by apt averment, and proof of the misdescription of A, recover upon the bond, for the use of the party damaged.

5. CHATTEL MORTGAGE—necessity of recording—purchasers, etc., with actual notice. Under our statute, the recording of a chattel mortgage is as essential to its validity, as against third persons, as any other element entering into the making of a valid chattel mortgage. It is a valid lien only

122	657
35	668
122	667
142	241
122	657
53	642
122	657
66a	278
122	657
70	328
122	657
72	398
122	657
174	484
73a	213
122	657
80a	53
122	657
100a *	20
100a *	638

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from the time of its being filed for record, even as against purchasers and creditors with actual notice.

6. SAME—*how to preserve the lien.* As against third persons, creditors or purchasers, the lien of a chattel mortgage can be preserved in only two ways: by the mortgagee taking and retaining possession of the property, or, if the mortgagor is to retain possession, then by the recording of a properly executed and acknowledged chattel mortgage providing for such possession.

7. EXECUTION LIEN—*as to chattels—when it attaches.* The lien of an execution in the hands of an officer attaches to all property which the debtor may own, or which he may acquire during the life of the execution. If, therefore, goods and chattels become the property of the execution debtor by sale and delivery to him, without the preservation of a lien for the purchase money in the form prescribed by the statute, the execution lien immediately attaches.

8. ERROR WILL NOT ALWAYS REVERSE—*improper instructions.* A modification of an instruction as to one point in a case, even if erroneous, is no ground of reversal, where it is evident that it worked no injury to the party complaining, as, where the jury must have found against him on another ground.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. L. C. COLLINS, Judge, presiding.

This was an action of debt, brought by the appellee, N. B. Boyden, coroner of Cook county, who sues for the use of Seth F. Hanchett, sheriff of Cook county, James H. Burke, John L. Barnum, Ralph Arthur, and Robert E. Jenkins, assignee of the estate of Josiah R. Butler, against E. W. Blatchford, Caleb F. Gates and Nathaniel H. Blatchford, upon a replevin bond.

The facts giving rise to this action are, that on April 6, 1883, Hanchett, sheriff of Cook county, having in his hands two executions against Charles S. Munson, (one in favor of John L. Barnum and Ralph Arthur, for \$1048.65 and costs, issued February 10, 1883, from the Superior Court of Cook county, and one in favor of Robert E. Jenkins, assignee of the estate of Josiah R. Butler, for \$733.14 and costs, issued March 1, 1883, from the circuit court of Cook county,) levied said executions upon certain goods and chattels, consisting of the furni-

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ture and fixtures in the Massasoit House, Chicago, as the property of Charles S. Munson. On the following day, April 7, 1883, Eliphalet W. Blatchford and Caleb F. Gates brought an action of replevin against the sheriff, and Burke, his deputy, and the plaintiffs in the executions, and caused the coroner to replevy said goods from the sheriff, and deliver the same to the plaintiffs therein. In this suit the replevin bond was given, N. H. Blatchford being surety for the plaintiffs. When this replevin suit came on for trial, the plaintiffs therein dismissed the same, and a return of the goods was awarded, and this suit was brought on the bond in that suit.

The defendants filed four pleas, as follows: *Nil debet* and *non est factum*, and two special pleas in mitigation of damages. The third plea was, in substance, that no trial of said replevin suit in said declaration mentioned was ever had in said circuit court of Cook county, and that said replevin suit in said declaration mentioned was dismissed by the plaintiffs therein, and the defendants aver that the said judgment in said action of replevin was entered upon the dismissal of that action in the circuit court of Cook county, and so the defendants say that the merits of the case were not determined in said action of replevin. And said defendants say that the goods and chattels in said writ of replevin mentioned, at the time when, etc., were the property of the said E. W. Blatchford and Caleb F. Gates, and not of the said plaintiffs, and this the defendants are ready to verify.

The plaintiff replied that he ought not to be barred, because he says the goods and chattels in said writ of replevin and writing obligatory mentioned, were, at the time when, etc., the property of said defendants in said writing obligatory mentioned, and not of the said E. W. Blatchford and Caleb F. Gates, as of said third plea alleged; and this he prays may be inquired of by the country.

The fourth was, in substance, *actio non*, because they say that the goods and chattels replevied were, at the time when,

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etc., the property of the plaintiffs Blatchford and Gates, and that the merits of the case have not been heard and were not determined in said cause. And the defendants aver that no trial was ever had of said replevin suit, and that said suit was dismissed by the plaintiffs therein, and that the right of property to the goods and chattels, etc., was not determined in said replevin suit.

The plaintiff replied that he ought not to be barred, etc., because he says that said goods and chattels in said replevin writ and writing obligatory mentioned, were, at the time when, etc., the property of the defendants in said writing obligatory mentioned, and not of the said defendants Blatchford and Gates.

A demurrer was sustained to the first plea, and issue joined on the second by adding the *similiter*.

Blatchford and Gates claimed the property under a chattel mortgage, dated April 4, 1881, from Charles S. Munson to them, under their firm name of E. W. Blatchford & Co., to secure payment of three promissory notes, payable to said firm, one for \$4800, due on or before six months from said date, and one for \$5800, due on or before twelve months from said date, both signed by Charles S. Munson and Maggie Munson, and one for \$13,000, due on or before two years from said date, signed by Charles S. Munson. The mortgagees were authorized to take possession on default, and sell the property at public auction or at private sale, with or without notice, for cash or on credit. On April 5, 1883, in the forenoon, Blatchford and Gates went to the Massasoit House, where the property then was, and took formal possession of the property, without moving it or in any way disturbing it, as it was distributed about the house. They then executed to Munson a bill of sale of the property for \$30,000, taking back a chattel mortgage to secure notes aggregating \$33,400, which was on the same day, at eleven o'clock A. M., recorded. At about noon of the same day Blatchford and Gates gave possession

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back to Munson, and on the following day the sheriff levied on the property, by virtue of the executions in his hands.

A trial was had, resulting in a verdict and judgment in favor of the plaintiff, for \$2543.50, costs of suit.

Messrs. LYMAN & JACKSON, and Mr. DAVID FALES, for the appellants:

The court erred in modifying appellants' instructions, to the effect that a chattel mortgage does not take effect, as against third persons, until it is recorded, thereby imposing the burden on appellants of proving that possession of the goods was not delivered to Munson until his mortgage was acknowledged and recorded.

A chattel mortgage can only operate on the property then actually belonging to the mortgagor; and a mortgage of goods which the mortgagor does not own at the time of making the mortgage, though he may after acquire them, is void as to third parties. Jones on Chattel Mortgages, sec. 138; Herman on Chattel Mortgages, sec. 46; Perkins on Title Grant, sec. 65; *Titus v. Mabee*, 25 Ill. 257; *Hunt v. Bullock*, 23 id. 320; *Roy v. Goings*, 6 Bradw. 162; *Stowell v. Blair*, 5 id. 104; *Williams v. Briggs*, 11 R. I. 476; *Gregg v. Sanford*, 24 Ill. 17; *Pettis v. Kellogg*, 7 Cush. 456; *Jones v. Richardson*, 10 Metc. 481; *Otis v. Sill*, 8 Barb. 102; *Chesley v. Josselyn*, 7 Gray, 489; *Gardner v. McEwen*, 19 N. Y. 123; *Griffith v. Douglas*, 73 Maine, 532; *Hamilton v. Rogers*, 8 Md. 301; *Pierce v. Emery*, 32 N. H. 484; *Looker v. Peckwell*, 38 N. J. 253; *Hunter v. Bosworth*, 43 Wis. 583; *Lane v. Morton*, 7 M., G. & S. 379.

Delivery of possession is necessary to consummate and perfect a sale of personal property, and until such possession was given, a chattel mortgage on the goods not delivered will be void.

The mortgagee had the right to sell to the mortgagor, and the mortgagee had the right to purchase at a foreclosure sale. Jones on Chattel Mortgages, 810; *Bame v. Drew*, 4 Denio, 287.

Brief for the Appellees.

Under the principle of law established by an unbroken line of authorities, the mortgage for the purchase money took precedence of all prior liens, and the liens of the executions in the hands of the sheriff. *Curtis v. Root*, 20 Ill. 53; *Austin v. Underwood*, 37 id. 438; *Fitts v. Davis*, 42 id. 392; Jones on Mortgages, sec. 464, *et seq.*; *Christie v. Hale*, 46 Ill. 117; *Speer v. Skinner*, 35 id. 282.

Mr. C. STUART BEATTIE, and Mr. HENRY S. GOLDSMITH, for the appellees Barnum and Arthur:

The plaintiffs in the executions, nominal or beneficial, having no property, general or special, in the goods, were not necessary, or even proper, parties to the replevin suit. Wells on Replevin, sec. 143; *Richardson v. Reed*, 4 Gray, 441; *Grace v. Mitchell*, 31 Mass. 533; *Mitchell v. Roberts*, 50 N. H. 486.

The sheriff was the proper person to recover, in the name of the coroner, for his own use, as sheriff, the amount of the liens represented by both the executions in his hands, and this right was in no way affected by the act of the plaintiffs in the replevin bond, in improperly joining the execution creditors as co-defendants with him, and naming them as such defendants in the condition of the bond. *Matthews v. Storms*, 72 Ill. 320, and *Arter v. People*, 54 id. 230, referred to, have no application.

The law requires a mortgagee of chattels to take and retain possession of the property on default. *Reed v. Eames*, 19 Ill. 594; *Burnham v. Muller*, 61 id. 456; *Thompson v. Wilhite*, 81 id. 356; *Ticknor v. McClelland*, 84 id. 472.

A chattel mortgage is only a lien by virtue of the statute, which makes it a lien only from the time of its record. Rev. Stat. chap. 95, sec. 4; *Burnham v. Muller*, 61 Ill. 456; *Self v. Sanford*, 4 Bradw. 328.

But the jury have found that the so-called foreclosure of the chattel mortgage was not *bona fide*, but colorable, merely.

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Mr. W. H. Sisson, and Mr. C. F. GOODING, for the appellee Jenkins:

The right to enforce the entire liability upon the bond was in the sheriff, and no additional liability was imposed upon the obligors by naming Jenkins, in any form, as a usee.

An action at law upon a contract must be brought in the name of the party holding the legal title. *Larned v. Carpenter*, 65 Ill. 543; *Dix v. Insurance Co.* 22 id. 272; *Lovejoy v. Stelle*, 18 Bradw. 281.

This bond runs to the coroner, and the addition of other parties in nowise affects the legal liability of appellants upon it, but only serves to identify the action in which it was filed.

The statute limits the lien of a chattel mortgage to two years. After April 4, 1883, the mortgage became of no validity. Possession was not taken until the day after the lien had expired.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

The declaration filed in this case is in the usual form, except that it is averred that said Robert E. Jenkins, as assignee of Josiah R. Butler, was plaintiff in execution in one of the executions levied by said sheriff, etc., and was incorrectly described in said bond as assignee of Josiah R. Barker. Defendants pleaded *non est factum*, and two special pleas, in mitigation, setting up that the merits of the case had not been determined in the action in which the bond was given, and title to the property in themselves, under chattel mortgage, etc. Issue was joined, and a trial resulted in a verdict and judgment thereon for plaintiff for \$2543.50. On appeal to the Appellate Court this judgment was affirmed, and the defendants below prosecute this further appeal.

The first point urged for reversal is, that it was error for the circuit court to admit the replevin bond in evidence,—the liability taken upon the obligors therein, being, as it is said, to

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Jenkins, assignee of Barker, and not to Jenkins, assignee of Butler, for whose use this suit is brought. The replevin bond was properly given to the coroner, and, upon condition broken, that officer was authorized to maintain suit thereon for the use of any person damaged by the wrongful suing out of the writ of replevin, or by the failure of the plaintiffs in replevin to return the property awarded to be returned by the judgment of the court. The property, at the time of the replevin, was in the legal custody of the sheriff, under his execution, and he was the proper person to be made defendant in the replevin suit. The return of the writ would show that it was taken from his possession, and to him only could it rightfully be returned upon the writ *retorno habendo*. The plaintiffs in execution were not necessary or proper parties to the replevin suit. They had no possession of or property in the goods and chattels replevined. It is clear, we think, that upon return of the goods and chattels being awarded, the plaintiffs in execution, who never had been in possession of them, or had general or special property in them, could not claim to be entitled to possession thereof, but they must be returned to the custody from whence they were taken, to be applied by the sheriff in satisfaction of the executions in his hand. *Wells on Replevin*, sec. 143; *Richardson v. Reid*, 4 Gray, 441; *Grace v. Mitchell*, 31 Wis. 553; *Mitchell v. Roberts*, 50 N. H. 486.

The plaintiffs in execution, having been made defendants in the replevin suit, and named as such defendants in the condition of the bond, were properly joined as usees, with the sheriff, but the right to enforce the entire liability being in the sheriff, their being joined as defendants in the replevin suit, or as usees in this, can in no way affect the right of recovery of the sheriff, or add to the liability of the obligors in the replevin bond. Jenkins and the other plaintiffs in execution are but nominal parties, at most, and their being joined or not, as beneficial plaintiffs, can in nowise prejudicially affect appellant. But if it was otherwise, there is no pretense that the

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plaintiff Jenkins is not the party who was plaintiff in the execution levied by the sheriff, and under which he held the property replevied by appellant, and the only thing complained of is, that the office or use for which he had obtained the judgment upon which the execution was issued, was improperly described in the bond. It will be remembered that Jenkins is not an obligee in the bond, nor is he attempting to enforce any liability thereon, and we see no reason why the coroner may not, by apt averments in the declaration, and proof of the misdescription, recover upon the bond for the use of the party damaged.

The chief controversy, however, arises upon the special pleas in mitigation of damages. To maintain these pleas, appellants offered in evidence a chattel mortgage, executed by Charles S. Munson, to them, under the firm name of E. W. Blatchford & Co., to secure the payment of three promissory notes, payable to E. W. Blatchford & Co., one for \$4800, due in six months, one for \$5800, due in twelve months, and one for \$13,000, due in two years from date, and all bearing date April 4, 1881. It was provided in the mortgage, that in case of default the mortgagees might take possession of the mortgaged property, and sell the same at public auction, after giving notice, or at private sale, with or without notice, for cash or on credit. The whole of the notes being due and unpaid, it appears that Gates, acting for the mortgagees, on the morning of the 5th of April, 1883, went through the rooms of the hotel, and formally took possession of the property. After it is claimed they took possession of the property, appellants claim to have sold back to Munson the entire property, for the consideration of \$30,000. A bill of sale was made, purporting to have been made by virtue of the terms and provisions of said chattel mortgage of April 4, 1881. Nothing was paid by Munson on the purchase. However, as part of the same transaction, he executed notes, and a chattel mortgage to secure the same, all bearing date April 5, 1883, under which last chattel mortgage appellants

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now claim they were entitled to the possession of said goods and chattels as against the liens of the executions in the hands of the sheriff. It is contended by appellants that their taking possession of the property under the chattel mortgage of April 4, 1881, the sale thereof to Munson in accordance with the terms and conditions of that mortgage, the execution of the bill of sale, and the making, acknowledging and recording of the chattel mortgage of April 5, 1883, were continuous acts, all parts of the same transaction, and that therefore the lien of the executions then in the hands of the sheriff, did not attach.

It will not be necessary, in this case, to determine whether the mode of foreclosure adopted, if it had been undertaken and carried out in good faith, would have created a superior lien under the mortgage or not. By the sixth and ninth instructions given at the instance of appellants, the jury were told that if they believed, from the evidence, that default had been made under the chattel mortgage of April 4, 1881, and that possession was taken by the mortgagees immediately upon said default occurring, then the legal title to the goods covered by said mortgage vested in the mortgagees, Blatchford and Gates, and they then had the right to sell the same, either at public or private sale, to the mortgagor or other persons, if done in good faith. They were also told by other instructions that the lien of the first chattel mortgage was preserved by taking possession on the morning of the 5th of April, 1883, to the exclusion of judgment creditors. And by the tenth instruction they were told that if the chattel mortgage offered in evidence, dated April 5, 1883, was given to secure the purchase money of the goods and chattels described therein, and that said mortgage was duly acknowledged by Munson, and recorded in the recorder's office of Cook county, Illinois, and that the sale to Munson, the making, acknowledgment and recording of the mortgage back for the purchase money, were all done at one and the same time, and as parts of one continuous transaction, and before the mortgagees had surrendered possession of the

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goods and chattels to Munson, then said chattel mortgage had priority over and was superior to the lien of the execution held by the sheriff against Munson, etc. Appellants' second, seventh and eleventh instructions are to the same effect. These instructions certainly state the law as favorably for appellants as they could ask it to be given, and fairly submitted to the jury, under the issues, the *bona fides* of the transaction of April 5, 1883, culminating in the execution and acknowledgment of the chattel mortgage of that date.

There was evidence tending to show that the mortgage of April 5, 1883, was not taken in good faith, and that the bad faith was participated in by both Gates and Munson. The points contested in the trial court, and the real issues there tried, as appears from the record, would seem to have been: First, did the pretended foreclosure and sale to Munson take place; and second, if it did, was it in good faith. No objection was made to the instructions bearing upon these questions, except the modification of the second, seventh and eleventh instructions of appellants, hereinafter considered. The finding of the jury being against appellants, and such finding having been approved by the judgment of the circuit court, and again affirmed by the Appellate Court, would be conclusive upon the issue of fact as to the *bona fides* of the sale to Munson, and of the chattel mortgage of April 5, 1883. We being precluded from a consideration of the facts, must accept the finding by the Appellate Court as conclusive.

It is, however, contended that the court erred in modifying the second, seventh, fourth and fifth instructions asked by appellants. The modification complained of, laid down the rule, that before the chattel mortgage lien could be held superior to that of the executions, the jury must find, from the evidence, that the mortgage was recorded before the mortgagees parted with the possession of the mortgaged property to Munson. These instructions were all asked upon the basis that the jury

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should first find that the sale to Munson, and taking back of the chattel mortgage, was made in good faith.

We are referred to cases where mortgages have been taken to secure the purchase money of land, and holding that where such mortgage is executed as a part of the transaction of the conveyance to the mortgagor, such mortgage will take precedence of judgments against the mortgagor. In those cases this superiority of lien is given to the mortgage, not because of any equity the vendor might be supposed to have for the purchase money of the land, but upon the grounds, "the execution of the deed and mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and vests in the mortgagee, without stopping at all in the purchaser, and during such instantaneous passage the judgment lien can not attach to the title." (*Curtis v. Root*, 20 Ill. 53; *Christie et al. v. Hale*, 46 id. 117; *Jones on Mortgages*, sec. 464, *et seq.*) In the conveyance of real estate, and taking back a mortgage to secure the purchase money, the title is vested in the mortgagor, subject to the mortgage delivered simultaneously with the deed. Nothing farther than the proper execution and delivery of the instruments is necessary to give validity to the mortgage. Under the Chattel Mortgage act the recording of a chattel mortgage is as essential to its validity, as against third persons, as any other element entering into the making of a valid chattel mortgage. It is a valid lien only from the time of its being filed for record, even as against purchasers and creditors with actual notice. *Frank v. Miner*, 50 Ill. 444; *Lemen et al. v. Robinson*, 59 id. 117.

The title to personal property vests immediately upon its sale and delivery to the purchaser. The fact that the mortgage is for the purchase money, or the intention of the parties that it is to be secured thereby, can give no vitality to the lien of the mortgage. As against third persons, creditors or purchasers, a chattel mortgage lien can be preserved in only two

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ways: by the mortgagee retaining possession of the property, or by the recording of a properly executed and acknowledged chattel mortgage, providing that the possession of the chattels shall remain with the mortgagor. The lien of an execution in the hands of a proper officer attaches to all property which the debtor may own, or which he may acquire during the life of the execution. If, therefore, goods and chattels become the property of the execution debtor by sale and delivery to him, without the preservation of a lien for the purchase money in the form prescribed by the statute, the execution lien immediately attaches. The time when the chattel mortgage lien shall become valid, as against third persons, is fixed by the statute at the time of its being filed for record, and courts have no power to say that it shall be good or valid until the statutory requirements have been complied with.

Further discussion will not be advantageous, however, for it is, we think, evident, that in no event could the modification complained of have prejudiced appellants. An examination of the evidence in the record will show that there is no pretense that there was any delivery of possession of the property to Munson before he went to have the mortgage acknowledged, or until after his return to the hotel from the recorder's office, where he had left the mortgage for record. The finding of the jury must, in view of this evidence, have been predicated upon the evidence tending to show want of good faith in taking the chattel mortgage of April 5, 1883, and appellants could not have been injured by the modification complained of.

We are of the opinion that no such error has intervened as will authorize a reversal, and the judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

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ACTIONS AND DEFENCES.

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2. *Remedy to recover on judgment of condemnation.* Where an ordinance for the condemnation of land by a village for a street, provides that the entire cost of the proposed improvement shall be paid by special assessments, so long as such ordinance remains in force it excludes every other mode of payment, and an action of debt will not lie on the judgment of condemnation against the village, although it may have taken possession of the land condemned. Such judgment can be paid, if at all, only by special assessments. *Village of Hyde Park v. Corwith*, 441.

DISCHARGE IN BANKRUPTCY.

3. *Who may avail of it.* See BANKRUPTOY, 1.

ADMINISTRATION OF ESTATES.

AS TO CLAIMS NOT DUE.

1. *As against estate of indorser of promissory note.* Under section 67, chapter 3, of the Revised Statutes, relating to the administration of estates of deceased persons, the indorsee of notes not yet due, where the liability of the indorser was absolute and not dependent upon any conditions, may have the same allowed against the estate of the latter, allowing the proper rebate of interest. Such indorsee or holder of the notes is a creditor of the estate, within the meaning of the law. *Dunnigan v. Stevens*, 396.

2. A, on January 1, 1881, sold a tract of land in the State of Indiana to B, for \$8000, of which \$500 was paid, taking notes for the balance, payable in one, two, three, four, five, six, seven, eight, nine and ten

ADMINISTRATION OF ESTATES. AS TO CLAIMS NOT DUE. *Continued.*

years, bearing eight per cent per annum interest, secured by mortgage on the premises sold, the last six of which the payee indorsed in blank to C. The notes provided that the drawers and indorsers severally waived presentment for payment, protest and notice of protest, and non-payment thereof, and they were made payable at a bank in Indiana, in which State they were so assigned. A statute of that State provided that notes payable to order or bearer in a bank in such State, should be negotiable as inland bills of exchange, and that the payees and indorsees thereof might recover as in a case of such bills, and the Supreme Court of that State held that the provisions of the law merchant in regard to the presentment for payment and notice of protest and non-payment might be waived by the terms of the contract, and that such waiver extended to the indorsers. A, the payee, died, and his administrator sold the other notes to a third person, who foreclosed the mortgage, making the mortgagor, B, and C, parties defendant. The sale only paid C \$500 of the notes held by him. A decree was rendered against B for the sum due on the other notes, on which an execution was returned *nulla bona*. *Held*, that the estate of A was liable to C on the notes so indorsed to the latter, notwithstanding they were not due at the time of filing the same. *Dunnigan v. Stevens*, 396.

AGENCY.**STATUTE OF FRAUDS.**

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AMENDMENT OF RECORD.

2. *After term—want of notice.* Three years after a decree of divorce in a Utah court, the record was amended so as to show jurisdiction of the defendant by due publication, which amendment was made without notice to the defendant in the suit: *Held*, that the amendment was a nullity, and could not be shown to cure a defect in the record or decree of divorce. *Tucker v. People*, 583.

APPEALS AND WRITS OF ERROR.**REVIEWING FACTS.**

1. *Question of excessive damages.* Whether the damages are excessive in an action on the case for personal injury from negligence, depends upon the facts, and when the judgment of the trial court is affirmed by the Appellate Court, its decision on that question is conclusive on this court. *Chicago and Eastern Railroad Co. v. Holland*, 461.

REVIEWING ACTION OF APPELLATE COURT.

2. *Only as to matters of record, and upon assignment of error.* The action of the Appellate Court in refusing to allow an amendment of the record on petition for a rehearing, so as to obviate an error apparent in the record, can not be reviewed by this court, when such refusal is not assigned for error, and when the stipulation of the parties to amend the transcript of the record from the trial court is not made a part of the record of the proceedings in the Appellate Court. *People, use, etc. v. Illinois and St. Louis Railroad and Coal Co.* 506.

3. *Examining opinion of Appellate Court—reviewing facts.* This court can not look into the opinion of the Appellate Court to learn on what its judgment was based, nor will it examine the evidence to ascertain whether the Appellate Court found correctly as to the facts in the case. *Ibid.* 506.

4. *Finding not reviewable.* It can not be assigned for error in this court that the Appellate Court found the facts of a case to be substantially as presented by the record at a former term. Such finding as to controverted facts is not subject to review in this court. *People ex rel. McCracken v. Soucy*, 335.

FINDING OF FACTS BY APPELLATE COURT.

5. *When the Appellate Court renders a general judgment of affirmance of a judgment in favor of the plaintiff in an action on the case for negligence, without a finding of the facts, this will amount to a finding of each fact necessary to the right of recovery, and this court will presume that the evidence sustains the declaration.* *Sangamon Coal Mining Co. v. Wiggerhaus*, 279.

RECITAL OF FACTS BY APPELLATE COURT.

6. The provisions of the statute requiring the Appellate Court, in cases where its judgment is the result of its finding the facts differently from the trial court, to recite in its final order or judgment the facts as found, is sufficiently complied with by a recital that the facts are substantially the same as they were in the record when before the court at a former term. The facts will be understood as those relating to the point made on the former hearing. *People ex rel. McCracken v. Soucy*, 335.

7. The Appellate Court, in its final order, found "that the facts are substantially the same as they were in the record when the cause was

APPEALS AND WRITS OF ERROR.**RECITAL OF FACTS BY APPELLATE COURT. *Continued.***

before this court at a former term, and that the same effect is to be given them as the Supreme Court determined in said cause should be given to them when that court decided the same," etc.: *Held*, that this is not an assumption that this court had settled the questions of fact by its decision. It amounts to a statement that the Appellate Court allows the same effect to be given to the facts which this court did. *People ex rel. McCracken v. Soucy*, 335.

8. If the Appellate Court does not recite the facts of the case in its final order, it will be deemed to have found them the same as the trial court. *People, use, etc. v. Illinois and St. Louis Railroad and Coal Co.* 506.

MATTER OF RECORD.

9. *What constitutes.* The statement of the clerk of the Appellate Court, that the stipulation of the parties in a case was filed in that court, giving a copy thereof, will not make the stipulation a part of the record. *Ibid.* 506.

ARREST OF JUDGMENT.**WHETHER ALLOWABLE.**

1. *After demurrer to declaration is overruled.* After judgment overruling a demurrer to a declaration, there can be no motion in arrest of judgment for any defect in the declaration that could have been taken advantage of on the demurrer. *Independent Order of Mutual Aid v. Paine*, 625.

ASSAULT.**JURISDICTION.**

Of circuit courts and justices of the peace—prosecution by indictment.
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ASSIGNMENT FOR THE BENEFIT OF CREDITORS.**BY NON-RESIDENT DEBTOR.**

Made in another State by non-resident debtor—whether enforceable here. See INSOLVENT DEBTORS, 1, 2.

ATTORNEY'S FEE.**STIPULATED FOR IN NOTE.**

Whether usurious. See USURY, 2.

BANKRUPTCY.**PLEADING DISCHARGE.**

1. *Who may plead it.* A discharge in bankruptcy, like the Statute of Limitations, does not annul the original debt or liability of the bank-

BANKRUPTCY. PLEADING DISCHARGE. *Continued.*

rupt, but merely suspends the right of action for its recovery. It therefore follows, that no one but the bankrupt can plead his discharge in avoidance of his liability. He may, if he choose, treat his covenants and obligations as still binding upon him. *Bush et al. v. Stanley et al.* 406.

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BILL OF REVIEW. See CHANCERY, 1, 2.

CHANCERY.**BILL OF REVIEW.**

1. *Requisites of the bill.* Where a bill is brought to review a former decree, it is necessary to set out the bill, answer and decree in the former proceeding. A mere skeleton of the record to be reviewed will not suffice. The bill should also show the point in which the party filing it feels himself aggrieved, but need not state the evidence in the former case. *Aholz v. Durfee et al.* 286.

2. *For newly discovered evidence.* In order to sustain a bill of review for newly discovered evidence, the new evidence must be of an important and decisive character, and must not be merely cumulative. If it is merely cumulative, and not decisive in its character, the bill will not lie. *Ibid.* 286.

CLOUD UPON TITLE.

3. *Who may complain—remedy at law or in chancery.* Unless the complainant is in possession of the land, or it is vacant and unoccupied, a bill will not lie to have a deed set aside as a cloud on the title; and where the bill fails to show such jurisdictional fact, no relief can be granted, but the party will be left to his remedy at law by action of ejectment. *Gage v. Curtis et al.* 520.

4. *Allegations and proofs must correspond.* See PLEADING AND EVIDENCE, 1, 2.

SPECIFIC PERFORMANCE.

5. *Of the performance by complainant.* A mother, of advanced years and in feeble health, made a verbal agreement, in May, with her daughter, to give her a house and lot at the death of the former if the latter would come to her house and live with her until her death, and care for her. The daughter did nothing until in October, and during the last sickness of the mother, in January, following, absented herself for two weeks and three days before the mother's death, leaving no one to take care of her, and her son, on being notified of the fact, employed

CHANCERY. SPECIFIC PERFORMANCE. *Continued.*

a nurse for her: *Held*, that this was not such a performance of the contract on the part of the daughter, as would call upon a court of equity to enforce it. *Gorham et al. v. Dodge*, 528.

6. *Parol agreement to convey land—whether established.* The specific performance of a parol contract for the sale of land will not be enforced by a court of equity, unless, in addition to other requirements, such contract is established, by competent proof, to be clear, definite and unequivocal in its terms. *Clark et al. v. Clark*, 388.

7. Testimony given years after alleged conversations as to what a father said about his intention to give or deed his son a farm, or as to his statements of what he told his son upon that subject, does not establish a clear, definite and unequivocal contract between the father and the son. A court of equity will not execute the expressed intention and expectation of a father to give his son a farm, unless such intention and expectation have ripened into and become embodied in a definite agreement. *Ibid.* 388.

8. A father rented a farm to his son in 1878 at a low rent, and the son being dissatisfied, in 1880 threatened to leave the place and go elsewhere, but afterward gave up that intention and continued to occupy the same, making some very trifling improvements for his own benefit, still paying the same rent, until his father's death, after which he rented the place of the devisee of his father. The proof showed that the father had several times stated that he had given, or intended to give, the farm to him, the son not being present, except on one occasion, and it did not appear that the son ever held possession other than as a tenant. After his father's death and his renting from the devisee, he filed his bill for specific performance of an alleged parol contract of his father to convey him the land, to which the Statute of Frauds was pleaded by answer, which also denied the contract: *Held*, that the bill could not be maintained. *Ibid.* 388.

MARSHALING ASSETS.

9. *Sales of land subject to incumbrance, in parcels.* See PURCHASER, 1.

MISTAKE.

10. *As a head of chancery jurisdiction—and of the protection, afforded purchasers without notice.* See MISTAKE, 2 to 5.

CONTESTING WILL.

11. *Time within which to exhibit a bill to contest.* See WILLS, 3, 4.

CHATTEL MORTGAGES. See MORTGAGES AND DEEDS OF TRUST, 5, 6, 7.

CLOUD UPON TITLE. See CHANCERY, 3, 4.

CONFLICT OF LAWS.**STATE AND FEDERAL JURISDICTION.**

1. *Generally.* A State has the same jurisdiction over all persons and things within its territorial limits, as any foreign nation, when that jurisdiction is not surrendered, or restrained by the constitution of the United States, and all those powers which relate to merely municipal legislation, or what may be called internal police, are not thus surrendered or restrained; and consequently, in relation to these, the authority of the States is complete, unqualified and exclusive. *Hoke v. People*, 511.

2. *Of concurrent jurisdiction in State and Federal courts in criminal matters—punishment under different jurisdictions for the same act.* See CRIMINAL LAW, 42, 43, 44.

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3. *For the benefit of creditors—made in another State by a non-resident debtor—whether enforceable here.* See INSOLVENT DEBTORS, 1, 2.

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4. *By what law governed.* See NEGOTIABLE INSTRUMENTS, 1.

CONSIDERATION.**FOR PROMISE TO PAY ATTORNEY'S FEE.**

In case a note is not paid, and is placed in the hands of an attorney. See USURY, 3.

CONSTITUTIONAL LAW.**DUE PROCESS OF LAW.**

1. *Power to legislate the property of one into the hands of another.* The phrase, "due process of law," in the constitutional clause that "no person shall be deprived of life, liberty or property without due process of law," means, in due course of legal proceedings according to those rules and forms which have been established for the protection of private rights. An arbitrary act of the legislature taking one person's property and giving it to another, is not "due process of law." *Board of Education v. Bakewell*, 339.

LEGISLATIVE EXERCISE OF JUDICIAL POWERS.

2. To ascertain whether a deed is conditional, and whether there has been a breach of the condition, and to enforce forfeiture for the breach if found to have occurred, call for the exercise of judicial functions which it is not within the competency of legislative power to exercise. *Ibid.* 339.

IMPRISONMENT FOR DEBT.

3. *Constitutional exemption limited to contracts.* See IMPRISONMENT FOR DEBT, 1, 2.

CONSTITUTIONAL LAW. Continued.**SPECIAL LEGISLATION.**

4. *Under the constitution of 1848—township organization and the county court—management of county affairs.* See **SPECIAL LEGISLATION**, 1, 2, 3.

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5. *Whether the subject is embraced in the title—constitution of 1848.* See **STATUTES**, 1.

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6. *Constitutionality of the third proviso of the 14th section of chapter 78 of the Revised Statutes.* See **JURY**, 6.

CONTRACTS.**CONSTRUCTION OF CONTRACTS.**

1. *Its object and purpose.* The legitimate purpose of all construction of instruments in writing is to ascertain the intention of the party or parties making the same; and when this is determined, effect will be given thereto accordingly, unless to do so will violate some established rule of property. *Lehndorf et al. v. Cope*, 317.

2. *Giving effect to every part of the instrument.* As it can not be presumed that words or terms in a conveyance were used without a meaning, or having some effect given to them, therefore, if it can be done consistently with the rules of law, that construction will be adopted which will give effect to the instrument and to each word and term employed, rejecting none as meaningless or repugnant. *Ibid.* 317.

3. *Determining the nature and quantity of estate granted by deed.* See **CONVEYANCES**, 1.

CONTRACT CONSTRUED.

4. *Subscription to capital stock—contract construed, as to limited liability for amount subscribed.* See **CORPORATIONS**, 7.

RESCISSON OF CONTRACT.

5. *Contract made by a mutual agent.* Where a contract is effected through the instrumentality of one who sustains the relation of agent to both the contracting parties, it may, as a general rule, be avoided, at the election of one or both of the parties. Such a contract is not void, but only voidable. *Wiley v. Stewart*, 545.

6. *Placing parties in statu quo.* If a party has received anything under a contract which is voidable, he must restore it, if practicable, before he will be permitted to repudiate the agreement. *Ibid.* 545.

7. A and B composed a banking firm, and A, B and C composed another firm engaged in business, which was indebted to the bank. A, as a member of the bank firm, loaned \$800 of a depositor's money to the firm of A, B and C, without the knowledge or consent of the depositor, or that of any of his partners. A credited the firm account of

CONTRACTS. RESCISSION OF CONTRACT. *Continued.*

A, B and C with the amount, and charged the account of the depositor with the sum so loaned, and executed a note, in the name of the firm of A, B and C, to the depositor, for the same, which he left in a bundle of the depositor's papers. In an action on the note brought by the payee, to whose hands it had come, B denied its execution by verified plea, but no return was made of the depositor's money, which was used in paying the firm debt of A, B and C: *Held*, that B was estopped from repudiating the contract and avoiding the note while taking the benefit of the depositor's money in paying his firm's debts. *Wiley v. Stewart*, 545.

PAROL AGREEMENT.

'8. *For the conveyance of land—performance to take the case out of the Statute of Frauds.* See STATUTE OF FRAUDS, 1 to 4.

CONVEYANCES.**INTEREST OR ESTATE GRANTED.**

1. *Determining the nature and quantity of estate granted by deed.* The nature and quantity of the interest or estate granted by a deed are to be ascertained from the deed itself, and are to be determined by the courts, as a matter of law. While the intention of the parties will control in the construction of the deed, it is the intention, apparent and manifest in the instrument, construing each clause, word and term involved in the construction according to its legal import, and giving to each thus construed its legal effect. *Lehndorf et al. v. Cope*, 317.

To GRANTEE "AND HER CHILDREN."

2. *Construed as including after-born children.* A husband, and his son by a former wife, purchased a tract of land, taking the conveyance in their names as trustees for the second wife "and her children": *Held*, that the words, "and her children," were words of purchase and not of limitation, but to be read conjointly with the name of the mother, and that the transaction being in the nature of a family settlement, provision was intended to be made for after-born children as well as those in being at the time. In such case the trustees hold also for children that may thereafter be born. *Dean et al. v. Long et al.* 447.

MISTAKE.

3. *In the description of land intended to be conveyed.* See MISTAKE, 3, 4, 5.

CORPORATIONS.**CORPORATION AGGREGATE.**

1. *Defined.* A corporation aggregate is an artificial being created by law, and composed of individuals who subsist as a body politic, under a special denomination, with the capacity of perpetual succession, and of acting, within the scope of its charter, as a natural person.

CORPORATIONS. CORPORATION AGGREGATE. *Continued.*

It has, for most purposes, a distinct identity from that of the individual corporators. *Nieteam v. Hay et al.* 293.

FRANCHISE.

2. *Defined.* The word "franchise" is often used in the sense of privileges generally, but in its more appropriate and legal sense the term is confined to such rights and privileges as are conferred upon corporate bodies by legislative grant. It is nothing more than the right or privilege of being a corporation, and of doing such things, and such things only, as are authorized by the charter. *Ibid.* 293.

3. *In whom vested.* It follows, from the very nature of a corporation, that a franchise, or the right to be and act as an artificial body, is vested in the individuals who compose the corporation, and not in the corporation itself. *Ibid.* 293.

4. *Not the subject of sale or transfer.* A corporation, in the absence of statutory authority, has no right or power to sell or transfer the franchise, or any property essential to its exercise, which it has acquired under the law of eminent domain. *Ibid.* 293.

5. *How lost.* A private corporation created by the legislature may lose its franchises by a *mis-user* or a *non-user* of them, and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain if there be grounds for a forfeiture, but not by mere legislative enactment. *Board of Education v. Bakewell*, 339.

6. The franchises and property of a private corporation not organized for pecuniary profit, will not be held to have been lost or surrendered to the State through expressions of mistaken legal opinion by its officials, or by the acceptance of legislative donations to such corporation. *Ibid.* 339.

SUBSCRIPTION TO CAPITAL STOCK.

7. *Contract construed, as to limited liability for amount subscribed.* A contract of subscription to the capital stock of a telegraph company provided that each subscriber should take the number of shares set opposite his name, and pay for the same in installments,—five per cent to be paid down, and the balance as the directors, from time to time, might order; and further provided that the company agreed that when forty per cent of the par value of the shares should be paid in, the number of shares subscribed by him should be issued to him as full paid stock of the company: *Held*, that the promise of the company to issue full paid stock upon the payment of the forty per cent, did not operate to limit the subscriber's liability to the payment of such per cent of the par value of the shares, but that the remaining sixty per cent might be collected after the issue of the stock: *Held*, also, that the words at the top of the subscription paper, "assessments not to exceed \$10 a share," could not in any way qualify the express promise to pay, in the body of the contract. *Great Western Telegraph Co. v. Gray*, 630.

CORPORATIONS. *Continued.*

8. *Limitation—when the statute begins to run—as to subscription payable in installments, on call.* See LIMITATIONS, 1, 2.

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9. *Of private corporation to assert its real character.* See ESTOPPEL, 5.

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10. *To appoint receiver, etc.—whether stockholders are necessary parties.* See PARTIES, 3.

11. *Former decisions—distinguished.* The cases of *Chandler v. Brown*, 77 Ill. 333, and *Lamar Ins. Co. v. Gulick*, 102 id. 41, distinguished from *Great Western Telegraph Co. v. Gray*. See PARTIES, 4.

COSTS.**IN CRIMINAL CASES.**

1. *Where there are several defendants.* Each of several defendants convicted of a criminal offence is liable for the costs made by the People in procuring his own conviction, and when two are convicted on a joint charge, they are severally liable for all the costs made by the prosecution in procuring their several convictions. *Kennedy et al. v. People*, 649.

2. So where three persons are tried together, and one is acquitted and two convicted of an assault, and fined, and ordered to stand committed to jail until the fines and costs are paid, those so convicted will be required to pay only the costs of their own conviction, and not the costs of the one acquitted. Ibid. 649.

TAXING WITNESS' FEES.

3. *Limiting number of witnesses—in proceedings under Eminent Domain act.* The general Cost act applies to proceedings to condemn land under the Eminent Domain act, and under it the court may, after the conclusion of the evidence, limit the number of witnesses whose fees are to be taxed against any party, not less than two, as may appear to have been necessary. *Chicago, Burlington and Northern Railroad Co. v. Bowman et al.* 595.

4. *Time of application to limit number of witnesses whose fees may be taxed—and how far discretionary.* A motion to limit the number of witnesses called by a defendant, whose fees are to be taxed against the plaintiff, made before the defendant has examined his witnesses, is premature, and therefore properly overruled. Ibid. 595.

5. There is no inhibition upon parties calling as many witnesses as they may desire; but every party must assume the risk of having taxed against him the fees of all such witnesses as the court may find were unnecessary, being not less than two. A motion to restrict a party to a certain number of witnesses whose fees may be taxed as costs, is addressed to the discretion of the trial court, and its decision is not subject to review, except where the discretion is abused. Ibid. 595.

COUNTY CLERK.**COMPENSATION.**

1. Where the salary and clerk hire of a county clerk have been fixed by the county board, his office being one in which fees are provided for, his compensation can only be paid out of the fees actually collected, and can not exceed them. He can only receive the amount so fixed in case the fees of his office equal that sum each year, and if such fees exceed that amount, he is bound to pay the excess into the county treasury. *People, use, etc. v. Toomey et al.* 308.

2. A county clerk, after receiving from fees earned and collected the full amount of his salary, clerk hire and other expenses, is not entitled to an allowance by the county board of the fees due him from the county for work done for the county. It would be an idle ceremony to pay him out of the treasury and then order him to pay the same back. *Ibid.* 308.

OFFICIAL BOND.

3. *Liability of surety thereon.* See OFFICIAL BONDS, 1, 2, 3.

COVENANTS FOR TITLE.**OF THE ESTATE ASSURED.**

1. *Limited to the estate actually conveyed.* The estate granted by a deed is neither enlarged nor restricted by the covenants for title therein contained or implied. Such covenants are but an assurance of the title granted, no matter to whom the grant is made. If the grantee takes but a life estate, the covenants assure that estate; and if he takes an estate in fee tail, the covenantor warrants to him but a life estate, and the remainder in fee to the one who will take upon the termination of the life estate. *Lehndorf et al. v. Cope,* 317.

CRIMINAL LAW.**SUFFICIENCY OF INDICTMENT.**

1. *Former adjudication.* Where this court holds an indictment sufficient, but reverses a conviction under the same and remands the cause, the judgment of this court will be conclusive as to the sufficiency of the indictment, on a second writ of error. *Tucker v. People,* 583.

ACCESSORY BEFORE THE FACT.

2. *As principal.* The statute abolishes the distinction between accessories before the fact and principals; by it all accessories before the fact are made principals. *Spies et al. v. People,* 1.

HOW THE ACCESSORY MAY BE CHARGED.

3. As the acts of the principal are made the acts of the accessory, the latter may be charged as having done the act himself, and may be indicted and punished accordingly. *Ibid.* 1.

PROOF OF THE VENUE.

4. It is not essential that the evidence shall directly and positively show that the offence of which one is charged was committed in the

CRIMINAL LAW. PROOF OF THE VENUE. *Continued.*

county. It will be sufficient if that fact is shown from the entire evidence. Proof that a crime was committed in Chicago, is proof that it was committed in Cook county, as the court will take judicial notice that Chicago is in Cook county. *Sullivan v. People*, 385.

BIGAMY.

5. *Proof of a former marriage, of the mode.* On a prosecution for bigamy, letters of the defendant written to his former wife while they were living together as husband and wife, showing that they were living together as such, and that she was acknowledged by him as his wife, are admissible in evidence to show the fact of the prior marriage. *Tucker v. People*, 583.

6. The statute relating to bigamy provides that it shall not be necessary to prove either marriage by the register or certificate thereof, or other record evidence, but the same may be proved by such other evidence as is admissible to prove a marriage in other cases. So it is competent to show the conversation and letters of the parties addressing each other as husband and wife, and the marriage may be shown by a certified copy from the records of the county clerk of the certificate of the person who performed the marriage ceremony, indorsed on the license. *Ibid.* 583.

CONSPIRACY.

7. *Defined.* A conspiracy may be described, in general terms, as a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. *Spies et al. v. People*, 1.

8. *Of the concurrence of the several members—how made to appear.* If one concur, no proof of agreement to concur is necessary. As soon as the union of wills for the unlawful purpose is perfected, the offence of conspiracy is complete. This joint assent of minds, like all other parts of a criminal case, may be established as an inference from the other facts proved,—in other words, by circumstantial evidence. *Ibid.* 1.

9. Though the common design is the essence of the charge of conspiracy, it is not necessary to prove that the alleged conspirators came together and actually agreed, in terms, to have that design and to pursue it by common means. If it be proved that they pursued by their acts the same object, often by the same means, one performing one part, another performing another part of the same, so as to complete it with a view to the attainment of that same object, the conclusion will be justified that they were engaged in a conspiracy to effect that object. *Ibid.* 1.

10. *What is an unlawful purpose—change of government by force.* It can not be properly assumed that "a conspiracy to bring about a change of government, by peaceful means if possible, but if necessary,

CRIMINAL LAW. CONSPIRACY. *Continued.*

to resort to force for that purpose," is not unlawful. The fact that the conspirators may not have intended to resort to force, unless, in their judgment, they should deem it necessary to do so, would not make their conspiracy any the less unlawful. *Spies et al. v. People*, 1.

11. *Not in at the inception.* It is not necessary to prove that the conspiracy originated with those who are particularly charged, or that they met during the process of its concoction; for every person entering into a conspiracy or common design, already formed, is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design. *Ibid.* 1.

12. *Not present at the consummation.* It makes no difference in the degree of responsibility resting upon those conspiring to do an unlawful act, that some of them were not present at the consummation of the design of the conspiracy. Where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and, in the execution of their design, a murder is committed, all of the company are equally principals in the murder, though at the time of the act some of them were at such a distance as to be out of view, if the murder be in furtherance of the common design. *Ibid.* 1.

13. *Specific malice not necessary.* In the case of a homicide, there might be no special malice against the person slain, nor deliberate intention to hurt him; but if the act was committed in the prosecution of the original purpose, which was unlawful, the whole party will be involved in the guilt of him who gave the blow. *Ibid.* 1.

14. *Particular result not anticipated.* A person may be guilty of a wrong which he did not specifically intend, if it came naturally, or even accidentally, through some other specific or general evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one proceeding according to the common plan terminates in a criminal result, though not the particular result meant, all are liable. *Ibid.* 1.

15. He who enters into a combination or conspiracy to do such an unlawful act as will probably result in the taking of human life, must be presumed to have understood the consequences which might reasonably be expected to flow from carrying it into effect, and also to have assented to the doing of whatever would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life. *Ibid.* 1.

16. *Difference in ultimate purpose—as between those who incite and those who execute.* If men combine together as conspirators to accomplish an unlawful purpose, as, the overthrow of society and government and law, called by them a "social revolution," and seek, as a means to an end, by print and speech, to excite to tumult and riot and murder,

CRIMINAL LAW. CONSPIRACY. *Continued.*

another class of persons having a different purpose in view, as, in case of workingmen who have entered upon a "strike" with the view of bringing about a reduction of the hours of day labor, then, notwithstanding the difference in the ultimate objects desired to be attained by the respective classes of persons, the conspirators who advised and instigated the others to violence will be held responsible for murder that may result from their aid and encouragement. *Spies et al. v. People*, 1.

17. *Original plan deviated from.* A plan for the perpetration of crime, or for the accomplishment of any action whether worthy or unworthy, can not always be executed in exact accordance with the original conception. It must sometimes be changed or modified in order to meet emergencies or unforeseen contingencies. *Ibid.* 1.

18. If A hire B to shoot C at a designated place, on a certain night, but B, seeing C at another locality on the same night, shoots him there, A is none the less guilty of aiding, abetting, advising and encouraging the murder of C. So if there be a conspiracy to kill policemen at a station house, but the agents of the conspiracy kill the policemen a short distance away from the station house, there is no such departure from the original design as to relieve the conspirators of responsibility. *Ibid.* 1.

19. *Specific means not appointed.* Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged. *Ibid.* 1.

20. *As to which of two persons caused the immediate injury.* In the case of a joint attack upon a body of persons, made by a number of other persons, with two kinds of weapons, as, pistols and bombs, in pursuance of a previously arranged conspiracy, and the murder of one of the persons attacked results, those of the attacking party who fired pistol shots only, will be equally responsible for the murder with the one throwing a bomb, although the killing was in fact done by the bomb and not by a pistol shot. *Ibid.* 1.

21. *Inciting to violence by newspaper organs, and speeches.* He who inflames people's minds, and induces them, by violent means, to accomplish an illegal object, is himself a rioter, though he takes no part in the riot. One is responsible for what wrong flows directly from his corrupt intentions. If he set in motion the physical power of another, he is liable for its result. If he contemplated the result, he is answerable, though it is produced in a manner he did not contemplate. If he awakes into action an indiscriminate power, he is responsible. If he gives directions vaguely and incautiously, and the person receiving them acts according to what he might have foreseen would be the understanding, he is responsible. It can make no difference whether the

CRIMINAL LAW. CONSPIRACY. *Continued.*

mind is affected by inflammatory words addressed to the reader through the newspaper organ of a society to which he belongs, or to the hearer through the spoken words of an orator whom he looks up to as a representative of his own peculiar class. *Spies et al. v. People*, 1.

22. The "International Association" in Chicago was an illegal organization engaged in making bombs and drilling with arms for the unlawful purpose of attacking the police force of the city in case the latter should assume to do their duty in the preservation of the public peace. Its members were conspirators, and, by their act of conspiring together, they jointly assumed to themselves, as a body, the attribute of individuality, so far as regarded the prosecution of the common design. Newspapers, conducted by members of the organization, as its organs, advocated the purposes of the conspiracy, and speakers addressed public meetings, called by some of the conspirators, inciting the people to resist the police, and advising riot and murder. The police were attacked, and several of them killed. On a prosecution of some of the conspirators for murder, it was held, that the utterances of these papers and speakers were competent evidence against the defendants, as showing the purposes and intentions of the conspiracy which they represented. *Ibid.* 1.

23. *Adopting the writings of others—Most's Science of Revolutionary Warfare.* On the same trial, Johann Most's book on the Science of Revolutionary Warfare, was admitted in evidence against the defendants. This book is a treatise upon the most improved methods of making bombs and preparing dynamite and other explosives, and contained suggestions as to how to apply the results of modern science to the work of destruction of the "capitalistic system," and advice to persons who, as members of the so-called revolutionary forces, might purpose to engage in the use of these weapons and explosives. The treatise was distributed among the members of the International groups at their picnics and meetings through the agency of the International Association. Its circulation was an act of the illegal organization to which all the defendants belonged, and was one of the methods by which that organization instructed and advised its members to get ready for the murder of the police during the excitement among the striking workingmen, at the time existing. Their newspaper organs commended it and quoted from it. Some of the conspirators read it and acted upon the suggestions contained in it. When the leaders of the organization thus made use of this treatise, they adopted it as a manual of tactics, and it became a book of their written advice and instructions to their followers. It was competent evidence as showing the purposes and objects which they had in view and the methods by which they proposed to accomplish those objects. *Ibid.* 1.

24. *Evidence—exhibiting to jury weapons similar to those used.* The policeman for whose murder the defendants were indicted, was killed

CRIMINAL LAW. CONSPIRACY. *Continued.*

by the explosion of a bomb thrown in the midst of the police force. On the trial the court allowed to be given in evidence, bombs, and cans containing dynamite, and prepared with contrivances for exploding it, which had been found under sidewalks and buried in the ground at certain points in the city, placed there by certain of the conspirators. As specimens of the kind of weapons which Lingg, the one of the conspirators who had charge of their manufacture, and his associates, were preparing, and as showing the malice and evil heart which the intended use of such weapons indicated, the introduction of bombs made by him was not improper. The jury had a right to see them and compare their structure with the description of the bomb that killed the policeman, with a view of determining whether Lingg, as was charged, was the maker of the latter or not. *Spies et al. v. People*, 1.

25. As to the fact that some of these bombs and cans, like some which had been shown to certain of the conspirators during their drill, were found buried near one of the designated meeting places where certain of the armed men were to assemble on the night of the attack of the police,—this was a circumstance proper to be considered by the jury in determining the nature and character of the conspiracy and its connection with the events of the night of the killing. *Ibid.* 1.

26. *The particular agency, or the particular victim, not known to the perpetrator.* It is not essential to the guilt of a person who has conspired with others for the commission of a crime, that in the preparation of the instrumentalities for the carrying out of the design of the conspirators, he did not know the name of the particular individual who was to use them. So where a number of persons conspired together to destroy the police force of a city, in a certain event, as, in case of a collision between them and workingmen, by throwing a bomb among the police, if the bomb-maker knew that it was to be thrown by one of those having the common purpose, that would be sufficient to affect him with the guilt of advising, encouraging, aiding or abetting the crime resulting from the act. *Ibid.* 1.

27. And it would be alike unimportant, in fixing the guilt of the bomb-maker, that he did not know what particular policeman might be injured or killed. The design of the conspiracy virtually designated the body or class of men who were to be attacked. Should one of such class be killed, the guilt would be the same as though a person having a particular name had been pointed out as the victim. *Ibid.* 1.

28. So, too, it would be immaterial that he did not know the bomb would be thrown at any particular time or place. It would be enough that he knew it was to be used at the place where the anticipated event might transpire,—the collision between the workingmen and the police. *Ibid.* 1.

29. *Identity of the person doing the particular act, sufficiently shown.* Though where, in the execution of the unlawful purpose of a

CRIMINAL LAW. CONSPIRACY. *Continued.*

conspiracy, a bomb was thrown among a body of police, for the purpose of sustaining a conviction of some of the conspirators for murder, as resulting from the throwing of the bomb, the identity of the bomb-thrower is sufficiently shown if it appeared he belonged to the conspiracy, and if he threw the bomb to carry out the conspiracy and further its designs, even though his name and personal description were not known. A person may very properly be charged with advising, encouraging, aiding and abetting an unknown principal in the perpetration of a crime. *Spies et al. v. People*, 1.

30. *As to the particular person doing the act, whether known or unknown—allegations and proofs in respect thereto.* In an indictment against several for murder, some of the counts charged the defendants with having advised, encouraged, aided and abetted a particular person named, in the perpetration of the crime, and evidence was introduced to show that the particular person named *did* perpetrate the crime. Other counts charged the defendants with having advised, encouraged, aided and abetted an *unknown person* in the commission of the crime, and proof was given which tended to show that the perpetrator of the crime *was* an unknown person. In this condition of the pleadings and the proofs, it was not required of the trial court that it should so direct the jury as to restrict them to the consideration of the case on the theory that the crime was committed by the particular person named, and to omit any reference to the other theory that it was perpetrated by an unknown person. *Ibid.* 1.

31. Under our statute, the man who, "not being present aiding, abetting or assisting, hath advised, encouraged, aided or abetted *the perpetration of a crime*," may be considered as the *principal* in the commission of the crime, may be indicted as *principal*, and may be punished as such. The indictment need not say anything about his having aided and abetted either a known principal or an unknown principal. It may simply charge him with committing the crime as *principal*. Then, if, upon the trial, the proof shows that the person charged, aided, abetted, assisted, advised or encouraged the perpetration of the crime, the charge that he committed it *as principal* is established against him. It would make no difference whether the proof showed that he so aided and abetted a *known* or an *unknown* principal. *Ibid.* 1.

32. *Consideration of the purposes and principles of the conspirators—as, that they are socialists, communists or anarchists.* If there be a conspiracy, and crime has resulted from it, it becomes material to show the purposes and objects of the conspiracy with the view of determining whether and in what respects it is unlawful. Anarchy is the absence of government; it is a state of society where there is no law or supreme power. If the conspiracy had for its object the destruction of the law and the government, and of the police and militia as the representatives of law and government, it had for its

CRIMINAL LAW. CONSPIRACY. *Continued.*

object the bringing about of practical anarchy. And when murder has resulted from the conspiracy, and the perpetrators are on trial for the crime, whether or not the defendants were anarchists may be a proper circumstance to be considered, in connection with other circumstances in the case, with a view of showing what connection, if any, they had with the conspiracy and what were their purposes in joining it. So it would be putting it too broadly to instruct the jury in such a case that it could not be material in the case that the defendants, or some of them, were or might be "socialists, communists, or anarchists," and such an instruction might well be refused. *Spies et al. v. People*, 1.

33. *Acts and declarations of one conspirator as the acts and declarations of all.* When the fact of a conspiracy is once established, any act of one of the conspirators in the prosecution of the enterprise, is considered the act of all. And when murder results from the act of the conspirators, individuals who, though not specifically parties to the killing, are present and consenting to the assemblage by whom it is perpetrated, are principals when the killing is in pursuance of the common design. *Ibid.* 1.

34. After a conspiracy has been established, only those declarations of each member, however, which are in furtherance of the common design can be introduced in evidence against the other members. Declarations that are merely narrative as to what has been done or will be done, are incompetent, and should not be admitted except as against the defendant making them, or in whose presence they were made. *Ibid.* 1.

35. *As to the order in which the proofs may be given, as to the existence of the conspiracy and the individual acts of its members.* Whether the acts and declarations of one of several alleged conspirators shall be allowed to be proven before proof is made of the conspiracy, or of the connection of those sought to be charged, is a matter largely discretionary with the trial judge. The proof of conspiracy which will authorize the introduction of evidence as to the acts and declarations of the co-conspirators may be such proof only as is sufficient, in the opinion of the trial judge, to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact. Sometimes, for the sake of convenience, the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy, the prosecution undertaking to furnish such proof at a subsequent stage of the cause. *Ibid.* 1.

36. The rule that the conspiracy must be first established *prima facie* before the acts and declarations of one conspirator can be received in evidence against another, can not well be enforced where the proof of the conspiracy depends upon a vast amount of circum-

CRIMINAL LAW. CONSPIRACY. *Continued.*

stantial evidence, a vast number of isolated and independent facts; and, in any case, where such acts and declarations are introduced in evidence, and the whole of the evidence introduced on the trial, taken together, shows that such a conspiracy actually exists, it will be considered immaterial whether the conspiracy was established before or after the introduction of such acts and declarations. The prosecution may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or it may prove the acts of the different persons, and thus prove the conspiracy. *Spies et al. v. People*, 1.

37. In many important cases evidence has been given of a general conspiracy, before any proof of the particular part which the accused parties have taken. In some particular instances, in which it would be difficult to establish the defendant's privity without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity. The term "acts," as here used, includes written correspondence and other papers relative to the main design. *Ibid.* 1.

MURDER—DEFINED.

38. *Malice presumed.* Murder is the unlawful killing of a human being in the peace of the people, with malice aforethought, either express or implied. Malice is always presumed where one person deliberately injures another. It is the *deliberation* with which the act is performed that gives it character. It is the opposite of an act performed under uncontrollable passion, which prevents all deliberation or cool reflection in forming a purpose. *Ibid.* 1.

DISPERSING PUBLIC ASSEMBLAGES.

39. *Right of resistance.* A mere order to an assemblage of persons to disperse, although the meeting be lawfully convened and peaceably conducted, will not excuse the throwing of a bomb into a body of policemen giving the order. *Ibid.* 1.

40. If, however, a bomb-thrower were illegally and improperly attacked by the police, while quietly attending a peaceable meeting, and he threw the bomb to defend himself against such attack, another question would be presented. *Ibid.* 1.

STATE AND FEDERAL JURISDICTION.

41. *Generally.* A State has the same jurisdiction over all persons and things within its territorial limits, as any foreign nation, when that jurisdiction is not surrendered, or restrained by the constitution of the United States, and all those powers which relate to merely municipal legislation, or what may be called internal police, are not thus surrendered or restrained; and consequently, in relation to these, the authority of the States is complete, unqualified and exclusive. *Hoke v. People*, 511.

CRIMINAL LAW. *Continued.***CONCURRENT JURISDICTION.**

42. *In criminal offences—punishment under different jurisdictions for the same act.* A general grant of jurisdiction to the Federal courts by act of Congress, is not, of itself, sufficient to vest exclusive jurisdiction in those courts, of all crimes and offences cognizable under the authority of the United States, unless so provided in the act. *Hoke v. People*, 511.

43. The State courts have jurisdiction to try and punish one guilty of the forgery of a draft purporting to have been drawn by a national bank, although such person may have been a clerk or book-keeper of such bank, and may be liable to punishment under section 5209 of the Revised Statutes of the United States, for the same act. *Ibid.* 511.

44. The purpose of section 5209 of the Revised Statutes of the United States, is the protection of national banks, and the punishment of breaches of trust on the part of those holding fiduciary relations toward such banks. It is not leveled against the common law crime of forgery, but against a breach of trust, and the offence is made only a misdemeanor. The State law against forgery is in no way repugnant to that section. *Ibid.* 511.

CONVICTION FOR LESSER OFFENCE.

45. Where a person is put upon trial for a crime which includes an offence of an inferior degree, the jury may acquit of the higher offence and convict of the lesser, although there may be no count in the indictment specifically charging the lesser offence. So when one is indicted for an assault with a deadly weapon, with intent to inflict a bodily injury, etc., he may be convicted of a simple assault. *Kennedy et al. v. People*, 649.

SEPARATE TRIALS.

46. *In criminal cases, where several are indicted.* Error can not be assigned upon the refusal of a trial court to grant separate trials where several are jointly indicted. It is a matter of discretion with the trial court. *Spies et al. v. People*, 1.

RECORD EVIDENCE IN CRIMINAL CASES.

47. *Right of accused to meet the witnesses face to face.* The constitutional provision that "in all criminal prosecutions the accused shall have the right to meet the witnesses face to face," has no reference to record evidence which may, during the progress of a criminal trial, become necessary to establish some material fact to secure a conviction. A record imports verity, and a cross-examination is foreign to and has no application to record evidence. *Tucker v. People*, 583.

ACCUSED TESTIFYING IN HIS OWN BEHALF.

48. *Criminating himself—latitude of cross-examination.* If a defendant in a criminal prosecution offers himself as a witness in his own behalf to disprove the criminal charge, he can not excuse himself from

CRIMINAL LAW. ACCUSED TESTIFYING IN HIS OWN BEHALF. *Continued.*

answering on cross-examination, on the ground that by so doing he may criminate himself. So far as concerns questions touching the merits, the defendant, by making himself a witness as to the offence, waives his privilege as to all matters connected with the offence. *Spies et al. v. People*, 1.

REASONABLE DOUBT.

49. *In criminal cases.* In a capital case, the trial court gave the rule as to a reasonable doubt, as affecting the finding of the jury, as follows: "The court instructs the jury, as matter of law, that in considering the case the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of 'not guilty.' If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt." The rule as thus formulated, has repeatedly received the approval of this court, and is correct. *Ibid*. 1.

50. In another instruction where the rule was somewhat differently expressed, these words were used: "You are not at liberty to disbelieve as jurors, if, from the evidence, you believe as men." This expression was unobjectionable. *Ibid*. 1.

VARIANCE IN NAME IN INDICTMENT.

51. *Middle initial in a name.* An indictment for bigamy charged that the defendant was lawfully married to Mary I. Bennett, while the proof showed a marriage to Mary Bennett: *Held*, no variance, as the letter "I" was no part of the name of the person named in the indictment. *Tucker v. People*, 583.

JURY AS JUDGES OF THE LAW.

52. *In criminal cases.* Under the statute providing that "juries in all criminal cases shall be judges of the law and fact," it is not improper for the court to tell the jury, that "if they can say upon their oaths that they know the law better than the court itself, they have the right to do so;" but that, "before saying this upon their oaths, it is their duty to reflect whether from their study and experience they are better qualified to judge of the law than the court." *Spies et al. v. People*, 1.

JURY.

53. *Peremptory challenges in criminal cases—of the number given to the prosecution.* See JURY, 7.

54. *Of the competency of jurors in criminal cases.* Same title, 4, 5, 6.

CRIMINAL LAW. *Continued.***FORM OF THE VERDICT.**

55. *On trial for murder—direction in respect thereto.* On the trial of several persons upon the charge of murder, the trial court instructed the jury as to the form of their verdict, as follows: "If all the defendants are found guilty, the form of the verdict will be: 'We, the jury, find the defendants guilty of murder, in manner and form as charged in the indictment,' and fix the penalty." "If all are found not guilty, the form of the verdict will be, 'We, the jury, find the defendants not guilty.'" And correspondingly, in case part were found guilty and part not guilty. The verdict was, guilty of murder. It was objected by the defendants, that under this instruction, the jury were obliged to find the defendants guilty or not guilty of murder, whereas the jury were entitled to find that the offence was a lower grade of homicide than murder, if the evidence so warranted. But the objection was not well taken. If the defendants desired to have the jury differently instructed, they should have prepared an instruction accordingly. *Spies et al. v. People*, 1.

COSTS IN CRIMINAL CASES.

56. *Where there are several defendants.* See COSTS, 1, 2.

DEPOSITIONS. See EVIDENCE, 2, 3.**DISCHARGE IN BANKRUPTCY.**

WHO MAY PLEAD. See BANKRUPTCY, 1.

DRAINAGE LAW.**TRIAL BY JURY.**

On appeal to the county court—from an assessment. See JURY, 1, 2, 3.

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 1.**EMINENT DOMAIN.****AS TO PROPERTY ALREADY APPLIED TO PUBLIC USE.**

1. *Condemning the right of way, along the line of one railroad, for the use of another company.* The legislature of the State, subject to the conditions in the constitution, has the power, by a general law, to authorize one railway company to condemn a part of the right of way of another, longitudinally, several miles, when necessary for the construction and use of the new road; but without such legislative authority such condemnation can not be had. *Illinois Central Railroad Co. v. Chicago, Burlington and Northern Railroad Co.* 473.

2. The general grant of power given in section 17, chapter 114, of the Revised Statutes, relating to railroads, to take and condemn real

EMINENT DOMAIN.**AS TO PROPERTY ALREADY APPLIED TO PUBLIC USE. *Continued.***

estate for railroad purposes, is not intended to extend to property already applied to a public use. *Illinois Central Railroad Co. v. Chicago, Burlington and Northern Railroad Co.* 473.

3. While the legislature have provided by law for the crossing and intersection of one railroad over and across the track and right of way of another, and required the company whose road is crossed or intersected, to unite with the new railway company in forming such intersections and connections, and grant the proper facilities therefor, it has not given a new railway corporation the right to condemn the right of way of a prior company, longitudinally, for a number of miles in length, or any part thereof, to the exclusion of such prior company. *Ibid.* 473.

4. The power to take the right of way, or any part of the right of way, of another railway company, is expressly limited by the statute to the purposes of crossing, intersecting and uniting,—or, more shortly stated, to the "connections" of the two roads. *Ibid.* 473.

5. The petitioning company has no power, under section 19 of the Railway act, to take any part of the right of way of another company, except for the purpose of some connection resulting from a crossing or intersection, or the uniting and joining of the two roads at some point in the line of the new road selected by the petitioning company. *Ibid.* 473.

MEASURE OF DAMAGES.

6. *As to land taken.* The fair market value of land proposed to be taken for public use under the Eminent Domain act, having proper regard to the location and advantages as to situation and the purposes for which it was designed and used, is the proper measure of compensation to be awarded. *Chicago, Burlington and Northern Railroad Co. v. Bowman et al.* 595.

7. Where a part is taken, and that part has a greater value, in connection with the whole, than as a separate parcel, the measure of damages will be the fair cash value of the part taken, as a part of the whole. *Ibid.* 595.

8. *As to lands not taken.* Where a cross-petition is filed for damages to land not sought to be taken, but a part of that sought to be condemned, the jury should award to the owner such damages, in cash, as his lands not taken will sustain, if any, by reason of the construction of the proposed railroad, and its continued use and operation, through his farm. In such case it is proper for the jury to give damages for all actual and appreciable injuries resulting from the construction and operation of the proposed railroad. *Ibid.* 595.

9. If the lands not taken will be depreciated in value by the construction and operation of the proposed railroad, the measure of dam-

EMINENT DOMAIN. MEASURE OF DAMAGES. *Continued.*

ages will be the difference in their market value before the construction of the road and after its construction. In determining this, the jury may consider the injury to the land arising from inconveniences actually brought about by the construction of the proposed railroad, or incidentally produced by dividing the land as to water, pastures and improvements, although such injury may not be susceptible of definite ascertainment, and also for such incidental injury as would result from the perpetual use of the track for moving trains, or from danger of killing stock, or injury to pasturing stock, or escape of fire, and generally for such damages as are reasonably probable to ensue from the construction and operation of the proposed road. *Chicago, Burlington and Northern Railroad Co. v. Bowman et al.* 595.

10. The physical condition of land over which a right of way is sought to be condemned for a railroad, whether affected by another railroad, a water-course, or other natural or artificial object, must be considered in the proceeding,—not in respect to the damage or depreciation caused by such other railroad, water-course, etc., but for the purpose of determining the damages occasioned to the owner by the proposed improvement. *Ibid.* 595.

11. *Proximate and remote damages.* While it is true that only real, tangible and proximate damages are recoverable, yet it is all such damages as are reasonably probable, as distinguished from possible, speculative or remote damages, that form the proper basis of recovery. *Ibid.* 595.

12. *Of an instruction—whether permitting remote or speculative damages.* An instruction that the land owner is entitled to just compensation for the land taken, and for all “reasonable and probable damage” to the balance of his land not taken, caused by taking the strip condemned for the uses and purposes of the proposed railroad, is not obnoxious to the objection that it opens the door to let in remote, conjectural and speculative damages. *Ibid.* 595.

ERROR.

WILL NOT ALWAYS REVERSE. See PRACTICE IN THE SUPREME COURT, 1, 2.

ESTATES IN LAND.**ESTATE LESS THAN A FEE.**

1. *Express words of limitation not essential.* In order to create an estate less than a fee, it is not necessary there shall be express words of limitation, either under the statute, (section 13 of the Conveyance act,) or at common law. It is sufficient for that purpose if it appear, by necessary implication, that a less estate is intended to be granted. *Lehndorf et al. v. Cope,* 317.

ESTATES IN LAND. *Continued.***ESTATE TAIL—LIFE ESTATE.**

2. *Estate tail, as at the common law, becomes a life estate under the statute.* Under our statute, (section 6 of the Conveyance act,) in all cases where, by the common law, any person might have become seized in fee tail of any lands, such person, instead of becoming seized thereof in fee tail, will take an estate for his life only, and the remainder will pass in fee simple to the person or persons to whom the estate tail would, on the death of the first grantee or donee, have passed at common law. *Lehndorf et al. v. Cope*, 317.

LIFE ESTATE, WITH REMAINDER OVER.

3. *A deed construed.* A deed of a tract of land to A, a married woman, "and her heirs by her present husband, B," conveyed to her what would have been an estate tail by the common law, but under our statute an estate for her life, only, with remainder in fee to her heirs by B, or those to whom the estate was immediately limited. It was held, the words, "to her heirs by her present husband, B," meant, to the issue of her body by her then present husband begotten. *Ibid.* 317.

4. In such case, if no issue of the body of the immediate grantee had been living at the date of the deed, or of its delivery, she would have taken only a life estate, and the remainder would have been what is known as "a contingent remainder;" but there being two of such children *in esse*, the remainder vested immediately in them in fee, subject to the possibility of being divested *pro tanto*, if the grant should be opened to let in after-born children of the same description. *Ibid.* 317.

MORTGAGE BY GRANTEE FOR PURCHASE MONEY.

5. *As embracing a less estate than that conveyed.* The owner of land conveyed the same to a married woman, "and her heirs by her present husband," she having at the time two such heirs, and she and her husband at the same time executed to the grantor a mortgage of the premises to secure a part of the purchase money not paid, evidenced by the wife's notes, and the mortgagee sold and assigned the same: Held, on bill by the assignee to foreclose, that the mortgage was limited to the life estate of the wife, and created no incumbrance on the remainder which vested in the heirs. *Ibid.* 317.

6. While it is true that a deed for land, and a mortgage of the same date taken for the purchase money, are but parts of a single transaction, nevertheless, one estate may be conveyed by the deed and a wholly different interest by the mortgage. If the vendor sees fit to take security by mortgage upon less than the whole land sold, or upon less than the estate conveyed, the contract will be valid, and the residue of the land or estate will pass by the deed, unencumbered by any lien in his favor. *Ibid.* 317.

ESTOPPEL.**CONDITIONS TO AN ESTOPPEL.**

1. *Generally.* It is of the essence of an estoppel *in pais*, that the party having authority to act in the matter shall have knowingly done an act to influence the conduct of the other, and that the other must have acted on the faith of that act. A person having no authority to act, can not, by his conduct, estop others not responsible for his conduct. *St. Louis, Alton and Terre Haute Railroad Co. v. City of Bellerville*, 376.

MUNICIPAL CORPORATION.

2. *A city will not be estopped by the acts or promises of a committee of the city council or the acts of the city attorney, such committee being known to have no power to do the act which is sought to be affected by estoppel.* *Ibid.* 376.

3. *Estoppe by deed not accepted.* If a municipal corporation may be subject to the doctrine of equitable estoppel, it can not be estopped by a deed to it of land for a roadway or street which it has never accepted or authorized to be accepted. *Ibid.* 376.

4. So a deed of land to a municipal corporation, for public use as a street, without acceptance, confers no rights on the grantor and imposes no obligations or duties upon the grantee. Leaving such deed with a city attorney for the city does not give effect to the same, and he can not accept the same, on behalf of the city, by any act of his without the authority of the city council. *Ibid.* 376.

PRIVATE CORPORATION.

5. *Not estopped to assert its real character in that regard.* Where the charter of a private corporation contemplates its establishment and maintenance by charitable donations, the acceptance of appropriations by it from the State, even though made by the State under the belief that such corporation is a State institution, will not operate to estop it from asserting its right of property as a private corporation. *Board of Education v. Bakewell*, 339.

RECITALS IN BENEFICIARY CERTIFICATE.

6. In an action against a benefit association, on a beneficiary certificate sealed with the company's seal and signed by its proper officers, which declares the deceased to be a member of the order in a certain lodge, the defendant will be estopped, by the recital in its deed, from showing that the lodge of the deceased was not properly organized. *Independent Order of Mutual Aid v. Paine*, 625.

TAKING UNDER DEVISE.

7. *As estoppel to question any part of the will.* See **WILLS**, 1, 2.

EVIDENCE.**PAROL EVIDENCE.**

1. *To prove contents of lost deed.* Under the Revised Statutes, chapter 116, section 28, providing that when it is shown orally in court

EVIDENCE. PAROL EVIDENCE. *Continued.*

"that the original of any deeds, conveyances or other written record evidence has been lost or destroyed, or not in the power of the party wishing to use it on the trial to produce the same, and the record thereof has been destroyed by fire, or otherwise, the court shall receive all such evidence as may have a bearing on the case, to establish the execution or contents of the deeds, conveyances, records or other written evidence so lost or destroyed," the recollection of witnesses as to the contents of such lost or destroyed instruments is clearly competent, and their recollection may be refreshed by reference to notes taken by them, and known to be correct. *Bush et al. v. Stanley et al.* 406.

DEPOSITIONS.

2. *Admissibility after making new parties.* In a chancery case, the court, by an order, found that the original complainant had no such interest in the subject matter as to enable him to maintain the bill, whereupon he was given leave to amend the same by the addition of a new party complainant, and for the filing of cross-bills, but the original bill was not dismissed; and it was ordered, by consent of the parties, that the depositions and evidence before taken, so far as competent, might be read on the final hearing, which was continued: *Held*, that there was no error in admitting such depositions in evidence on the final hearing. *Ibid.* 406.

3. *Stipulation that depositions taken may be read.* The parties to a suit in chancery have the right to agree, and have their agreement entered of record, that the depositions and evidence already taken in certain other cases, so far as the testimony is competent, may be read on the hearing, and such an agreement waives all objections to the time and mode of taking the depositions. *Ibid.* 406.

RELEVANCY.

4. *Under the issues.* In an action of assumpsit upon a certificate of membership, against a mutual aid association, by the beneficiary of the deceased member, to recover the sum agreed to be paid on his death, the defendant pleaded the general issue and *non est factum*. On the trial the defendant offered to prove that the lodge of which the deceased was a member, had not been properly organized, although it had received its charter, and, as a body, was acting under it, with the knowledge and sanction of the defendant association: *Held*, that the proposed evidence was not pertinent to the issues, under the pleas, and was irrelevant, as not tending to show any defence to the action. *Independent Order of Mutual Aid v. Paine*, 625.

ATTACKING JUDICIAL PROCEEDINGS COLLATERALLY.

5. *For mere error.* A judgment foreclosing a mortgage by *scire facias*, and the sale of the mortgaged premises thereunder, can not be defeated by errors and irregularities in the proceeding not affecting the jurisdiction of the court. *McCormick et al. v. Bauer et al.* 573.

EVIDENCE. *Continued.***RES GESTÆ.**

6. *Statements and declarations—as part of the res gestæ.* In an action by a party injured by a collision with a railway train, against the railway company operating such train, the plaintiff will have the right to show the position of the defendant's train, and what precaution, if any, the conductor in charge of the train had taken to guard against danger; and the statements or declarations of the conductor a few moments before the collision, being a part of the *res gestæ*, may be shown for that purpose. *Chicago and Eastern Railroad Co. v. Holland*, 461.

COMPUTATION OF TAXES BY COUNTY CLERK.

7. *As to taxes due as shown by collector's books.* On bill to foreclose a lien on lands for taxes of several years, the county clerk testified that he had, at the request of the State's attorney, examined the collector's books, and made a computation of the taxes due and unpaid, as shown by such books, and had prepared a paper showing the balance unpaid, which he, on request, attached to his deposition as a part thereof: *Held*, that there was no valid objection to the evidence, it being a tabulated statement from the books. If there was any error or mistake in the statement of the clerk, it might be shown on cross-examination. *Mix et al. v. People*, 641.

UNITED STATES LAND PATENT.

8. *As paramount to certificate of entry.* While the statute makes the official certificate of any register or receiver of a land office of the United States, evidence of certain things, yet it declares that the patent issued by the United States shall be deemed and considered a better legal and paramount title in the patentee, his heirs or assigns, than such register's or receiver's certificate. *Bush et al. v. Stanley et al.* 406.

CERTIFICATES OF REDEMPTION.

9. *From sale for taxes and special assessments.* The law requires the clerk of the county court to make an entry in the records of his office, of all redemptions from sales of lands for taxes and special assessments, and provides that the books and records belonging to his office, or copies thereof, certified by him, shall be deemed *prima facie* evidence to prove the sale of land, etc., for taxes or special assessments, and the redemption of the same. Certificates of the redemption of land made by such clerk are, within the meaning of the statute, "certified copies of the record of redemption," and are admissible as evidence of redemption. *Ibid.* 406.

PHYSICAL EXAMINATION OF PLAINTIFF.

10. *In a suit for personal injuries.* In an action against a railway company to recover for personal injuries to the plaintiff, occasioned by negligence, the defendant asked for an order of court that the plaintiff submit to an examination by certain physicians named in the motion,

EVIDENCE. PHYSICAL EXAMINATION OF PLAINTIFF. *Continued.*

which was overruled. Something over a year later the defendant sent two physicians of its selection to examine as to plaintiff's physical condition, one of whom had before made a thorough examination, who was not admitted, but the other was, and made an examination. Still later, another of the physicians named in the motion was allowed to make a thorough examination of the plaintiff: *Held*, that as the defendant had the benefit of an examination by three of its physicians, it could not complain of the overruling of its motion. *Chicago and Eastern Railroad Co. v. Holland*, 461.

CROSS-EXAMINATION.

11. *Accused testifying in his own behalf—latitude of cross-examination.* If a defendant in a criminal prosecution offers himself as a witness in his own behalf to disprove the criminal charge, he can not excuse himself from answering on cross-examination, on the ground that by so doing he may criminate himself. So far as concerns questions touching the merits, the defendant, by making himself a witness as to the offence, waives his privilege as to all matters connected with the offence. *Spies et al. v. People*, 1.

12. *Giving in evidence a letter the contents of which have been proven by the opposite party.* On the trial of a case the defendant laid the foundation for the introduction in evidence of a letter handed to a witness, who identified the letter, and, on his direct examination, stated its contents to the jury. On cross-examination the letter itself was allowed to be given in evidence: *Held*, no error. If its contents were proper evidence for the defendant, the letter itself was also for the plaintiff. *Chicago and Eastern Railroad Co. v. Holland*, 461.

REFRESHING WITNESS' RECOLLECTION.

13. *Where a witness, on his direct examination, simply refers to memoranda to refresh his memory, and then testifies to his recollection thus aided, if such memoranda are given in evidence, on his cross-examination, at the instance of the adverse party, the latter can not complain of their admission.* *Bush et al. v. Stanley et al.* 406.

EVIDENCE TO ESTABLISH A CONSPIRACY.

14. *And of proofs permissible after the fact of a conspiracy has been established.* See CRIMINAL LAW, 7 to 37.

RECORD EVIDENCE IN CRIMINAL CASES.

15. *Right of accused, in criminal case, to meet the witnesses face to face.* Same title, 47.

BIGAMY.

16. *Proof of former marriage, of the mode.* See CRIMINAL LAW, 5, 6.

EXCEPTIONS AND BILLS OF EXCEPTIONS.**BILL OF EXCEPTIONS.**

1. *When necessary.* Affidavits filed in a cause do not become a part of the record sent up on appeal or error, unless made so by being incorporated into a bill of exceptions. *Chicago, Burlington and Northern Railroad Co. v. Bowman et al.* 595.

EXECUTION LIEN.**AS TO CHATTELS.**

When it attaches. See LIENS, 1.

FEDERAL AND STATE JURISDICTION. See CRIMINAL LAW, 41 to 44.**FEES AND SALARIES.****FINES AND FORFEITURES.**

1. *As including penalties—the statute construed.* The words, "fines or forfeitures," in section 8, of chapter 53, relating to fees and salaries, as amended in 1883, are broad enough to include penalties for violation of law, the word "fine" and the word "penalty" being often used interchangeably, to designate the same thing. *People v. Nedrow*, 363.

2. *State's attorney's lien on penalty under the Pharmacy act.* State's attorneys have a lien for their fees upon judgments for the penalties named in the Pharmacy act, as well as upon judgments for other penalties, fines or forfeitures, and it is made their duty to prosecute suits for the collection of such penalties. *Ibid.* 363.

3. *And as respects the question of the existence of the lien, it matters not that the State's attorney at whose instance the lien is declared was not the officer who did the most of the work in the case in which the penalty was recovered.* As to whether that officer is entitled to the lien, or his predecessor is entitled to it, does not concern the board of pharmacy. The lien exists in favor of the officer. *Ibid.* 363.

COUNTY CLERK.

4. *Of his compensation and clerk hire.* See COUNTY CLERK, 1, 2.

FELLOW-SERVANTS.**WHO SO REGARDED.**

1. *As to locomotive engineer and car inspector.* The servants of the same master, to be co-employees, so as to exempt the master from liability on account of injuries to one resulting from the negligence of another, must be directly co-operating with each other in a particular business,—that is, in the same line of employment,—or their mutual duties must bring them into such habitual association that they may exercise a mutual influence on each other promotive of proper caution. *Chicago and Alton Railroad Co. v. Hoyt*, 369.

FELLOW-SERVANTS. WHO SO REGARDED. *Continued.*

2. It was the duty of a car inspector to inspect freight cars on their arrival at the yards of the company. As soon as a train arrived the superintendent of that department directed the inspector to go upon the cars and begin the work of inspection, which he did on this occasion as soon as the train came to a full stop, and when about to step from one car to another, the engineer, without warning, suddenly started the engine with such unusual force that the train parted, and the inspector fell upon the track and was injured. The proof showed that when a freight train came to a certain place, as it did on the particular occasion, the engineer's duty in respect to the train ceased, and it was his duty to take his locomotive to the engine house, and after the inspection the train would be broken up by a switch-engine and set apart: *Held*, that the engineer and inspector were not fellow-servants engaged in the same employment, and that the railway company was liable for the injury to the inspector, he having been found to have exercised due care. *Chicago and Alton Railroad Co. v. Hoyt*, 369.

3. In such case, the duties of the engineer ceased at or before the inspectors began, so that it was impossible for the one to have exercised any influence whatever over the other, and therefore an instruction based upon the theory of their being fellow-servants was properly refused. *Ibid.* 369.

FINES AND FORFEITURES.

AS INCLUDING PENALTIES. See **FEES AND SALARIES, 1, 2, 3.**

FIXTURES.**WHETHER REMOVABLE.**

1. *As, whether a part of the realty, and not removable, or personal, and removable.* There are three tests of the character of fixtures, as to their being irremovable, viz.: First, actual annexation to the realty, or something appurtenant thereto; second, application to the use or purpose to which that part of the realty with which they are connected is appropriated; and third, the intention of the parties making the annexation to make a permanent accession to the freehold. The latter test appears to be the principal one. In cases of doubt, the intention of the parties must control. *Sword v. Low*, 487.

2. While parties may not, by contract, make personal property real or personal at will, yet when an article personal in its nature is so attached to the realty that it can be removed without material injury to it or to the realty, the intention with which it is attached will govern; and if there is an express agreement that it shall remain personal property, or if, from the attendant circumstances, it is evident or may be presumed that such was the intention of the parties, such article will be held to have retained its personal character, even as against subsequent purchasers or incumbrancers. *Ibid.* 487.

FIXTURES. WHETHER REMOVABLE. *Continued.*

3. The rule that the intention with which the annexation is made will control as to the character of the fixture, does not apply to such articles as enter into and form parts of a structure appurtenant to land, such as lumber, stone and shingles, or to doors, windows and grates, and the like articles which are incorporated into the structure. These and the like articles lose their identity and become a necessary part of the structure, and are clearly distinguishable from such articles as are or may be merely annexed to the freehold and retain their characteristics, and may be removed in their entirety without material injury. *Sword v. Low*, 487.

4. While it may be conceded that portable mills, engines, boilers and the like, even slightly affixed to the realty, will, in the absence of circumstances raising a contrary presumption, or evidence showing a contrary intention, be presumed to have been attached as permanent accessions to the soil, yet however permanently attached, if removable without material injury, the intention to be inferred from the circumstances, and the relation of the parties to each other and to the realty, or as shown by evidence, will be of controlling and decisive importance. *Ibid.* 487.

5. Where it is agreed, on the sale of a steam boiler and engine, that the vendor is to have a lien thereon, by chattel mortgage, until the price is paid, and the purchaser gives a mortgage on the same for the price, and afterward, after setting up the same on a lot purchased by him, he renews the chattel mortgage, in which he treats the property as chattels, it will not become part of the realty if it may be removed without material injury to the freehold. *Ibid.* 487.

6. The purchaser of a boiler and engine agreed to and did give the vendor a chattel mortgage thereon, on April 4, 1881, maturing July 7, 1881. On May 14, 1884, the former bought a lot, and set the engine and boiler on the same for use. On July 7, 1881, a new chattel mortgage on the same property, and note, were given, falling due January 7, 1882. The purchaser being indebted to a third person, conveyed to him the lot on which the engine and boiler were set and in use, who sought to enjoin the taking of the property under the chattel mortgage. The proof failed to show that the removal of the boiler and engine would materially damage the same, or the realty: *Held*, that the boiler and engine remained personal property, and were subject to be taken under the chattel mortgage, as against the purchaser of the realty. *Ibid.* 487.

FORMER ADJUDICATION.**IN THE SUPREME COURT.**

1. Where a question either of law or fact has been decided by this court in a case properly before it, the same question can not be again raised in that case except upon petition for rehearing; and when a de-

FORMER ADJUDICATION. IN THE SUPREME COURT. *Continued.*

case has been reversed, and remanded to the trial court with directions as to the decree to be entered, on a subsequent appeal errors can not be assigned for any cause that existed prior to the former decision in this court. *Mix et al. v. People*, 641.

2. A decision by this court, that *mandamus* will not lie to compel a village to pay a judgment of condemnation of land for a street out of a fund to be raised by a general tax, and that the ordinance under which the condemnation was had is still in force and not repealed, becomes *res judicata* as to such matters, and an action of debt by which it is sought to recover a judgment for the compensation awarded, seeking the same end, can not be sustained. *Village of Hyde Park v. Corwith*, 441.

3. The decision of a question by this court, when involved in a subsequent case in which the parties are not identical with those in the former case, can not be treated as *res judicata*; yet, on the principle of *stare decisis*, the holding is just as binding on this court as any of its decisions, and will govern it, unless some imperative reason appears for departing from it. *McCormick et al. v. Bauer et al.* 573.

4. Where this court holds an indictment sufficient, but reverses a conviction under the same and remands the cause, the judgment of this court will be conclusive as to the sufficiency of the indictment, on a second writ of error. *Tucker v. People*, 583.

FORMER DECISIONS.**PARTIES.**

1. In suit against corporation to appoint receiver, etc.—whether stockholders are necessary parties. The cases of *Chandler v. Brown*, 77 Ill. 333, and *Lamar Ins. Co. v. Gulick*, 102 id. 41, distinguished from *Great Western Telegraph Co. v. Gray*. See PARTIES, 3, 4.

FRANCHISE.

CORPORATE FRANCHISE. See CORPORATIONS, 2 to 6.

FRAUD.**IN ASSESSMENT.**

To invalidate tax. See TAXATION AND TAX TITLES, 7.

IMPRISONMENT FOR DEBT.**CONSTITUTIONAL EXEMPTION.**

1. *Limited to contracts.* The constitutional provision prohibiting imprisonment for debt, applies to actions on contracts, express or implied. As to the debts thereby intended, there must be the relation of debtor and creditor. The prohibition does not extend to actions for torts, nor to fines or penalties arising from a violation of the penal laws of the State. *Kennedy et al. v. People*, 649.

IMPRISONMENT FOR DEBT.**CONSTITUTIONAL EXEMPTION. *Continued.***

2. Section 14 of division 14, chapter 38, relating to crimes, etc., which authorizes a commitment to the county jail for the payment of a fine and costs, is not in contravention of the constitutional provision prohibiting imprisonment for debt. The costs in a criminal prosecution is not a debt, within the meaning of such provision. *Kennedy et al. v. People*, 649.

INCUMBRANCERS.**PRIOR AND JUNIOR.**

Adjustment of equities between them—and when priority of right is lost. See MORTGAGES AND DEEDS OF TRUST, 3, 4.

INDORSER.**OF HIS LIABILITY.**

1. *By what law governed.* See NEGOTIABLE INSTRUMENTS, 1.
2. *Character of liability under the law merchant.* Same title, 2.
3. *Waiver of presentment and notice, as qualifying character of his liability.* Same title, 3, 4.

INSOLVENT DEBTORS.**VOLUNTARY ASSIGNMENT.**

1. *For the benefit of creditors, made in another State—whether enforceable here.* A voluntary assignment made in another State by a non-resident debtor, executed in conformity with our laws in respect to the conveyance of property, inconsistent, in substantial respects, with our statute relating to assignments, will not be enforced here to the detriment of our citizens; but for all other purposes, if the assignment be valid by the *lex loci*, it will be carried fully into effect. *Rhawn v. Pearce*, 110 Ill. 350, is not in conflict with this rule, as in that case the assignment was by operation of the law of another State, which could not pass property out of its limits. *May v. First National Bank*, 551.

2. Non-resident owners are authorized by our laws to make conveyances of land situated in this State, if made pursuant to our law for the making of such conveyances. Therefore, a voluntary assignment of a non-resident debtor in form sufficient to convey real estate, will be held valid, unless made in contravention of some law or policy of this State. *Ibid.* 551.

3. *Preference among creditors—in a foreign voluntary assignment.* The provision in our statute prohibiting all preferences in assignments by debtors, applies only to those made in this State, and not to those made in other States. The statute concerns only domestic assignments and domestic creditors. *Ibid.* 551.

INSOLVENT DEBTORS. VOLUNTARY ASSIGNMENT. *Continued.*

4. Non-resident debtors may execute voluntary assignments, with or without preferences, among foreign creditors, as they may see fit, so long as creditors in this State are not injuriously affected thereby. *May v. First National Bank*, 551.

INSTRUCTIONS.**REPEATING PROPOSITIONS OF LAW.**

1. *In different words.* If the jury has been properly instructed as to the law involved in a case, the judgment will not be reversed, although some of the refused instructions may contain correct statements of the law. And there will be no error in the modification of an instruction, when the substance of it, as asked, has been given in another one. *Chicago and Eastern Railroad Co. v. Holland*, 461.

ERRONEOUS ONE CURED BY OTHERS.

2. It was complained of an instruction given in a series, in a capital case, that it omitted all *reference to the evidence*, as being the guide to the jury in their finding. The trial judge, of his own motion, after having given the instructions as asked by the respective parties, gave the following: "What are the facts and what is the truth the jury must determine *from the evidence, and from that alone*. If there are any unguarded expressions *in any of the instructions*, which seem to assume the existence of any facts, or to be any intimation as to what is proved, all such expressions must be disregarded, and the *evidence only* looked to to determine the facts." This was enough to cure the omission complained of. It is the duty of the jury to consider all the instructions together, and when this court can see that an instruction in the series, although not stating the law correctly, is qualified by others, so that the jury were not likely to be misled, the error will be obviated. *Spies et al. v. People*, 1.

3. Although an instruction, considered by itself, is too general, yet if it is properly limited by others given on the other side, or by the court of its own motion, so that it is not probable that it could have misled the jury, judgment will not be reversed on account of such instruction. *Ibid.* 1.

NUMEROUS INSTRUCTIONS.

4. *Not encouraged.* The practice of giving a great many instructions in a case involving no difficult or complicated questions of law, should not be encouraged, as they ordinarily tend to mislead rather than to enlighten the jury. *Chicago and Eastern Railroad Co. v. Holland*, 461.

INSTRUCTION CONSTRUED.

5. *As whether leading jury to give exemplary damages.* In an action for damages for an injury claimed to be the result of defendant's negligence, the court instructed the jury, at plaintiff's request, that in

INSTRUCTIONS. INSTRUCTION CONSTRUED. *Continued.*

determining the question of negligence they should take into consideration the conduct of both parties at the time of the alleged injury, as disclosed by the evidence; and if they believed, from the evidence, that the injury complained of was caused by the negligence of the defendant's servants, as charged in the declaration, and if they further believed, from the evidence, that the plaintiff was without fault, and was exercising ordinary care and prudence in the discharge of his duties, then the plaintiff was entitled to recover such damages as the jury might believe, from all the evidence, he was entitled to receive, as a compensation for all the injuries received and suffered by him in the premises. No exemplary damages were claimed by the pleadings or evidence: *Held*, that the instruction was not subject to the objection that under it the jury might give exemplary damages. *Chicago and Eastern Railroad Co. v. Holland*, 461.

JUDICIAL POWERS.

EXERCISE BY LEGISLATURE. See CONSTITUTIONAL LAW, 2.

JURISDICTION.**ASSAULT.**

1. *Circuit courts and justices of the peace—prosecution by indictment.* Circuit courts have original jurisdiction in all cases of misdemeanors, which includes assaults, and all offences cognizable in such courts may be prosecuted by indictment. *Kennedy et al. v. People*, 649.

2. The fact that the statute gives to justices of the peace jurisdiction in cases of assault, does not give them exclusive jurisdiction thereof. They can not be vested with exclusive jurisdiction under the present constitution. *Ibid.* 649.

STATE AND FEDERAL.

3. *Of crimes and offences, generally.* See CRIMINAL LAW, 41.

4. *Concurrent jurisdiction in criminal offences—punishment under different jurisdictions for the same act.* Same title, 42, 43, 44.

SERVICE BY PUBLICATION.

5. *As giving jurisdiction.* See SERVICE BY PUBLICATION, 1.

JURY.**RIGHT OF TRIAL BY JURY.**

1. *On appeal from assessment under Drainage law.* A land owner, on appeal to the county court from an assessment, under section 27 of the Drainage act, approved June 27, 1885, is entitled to a trial by a jury, if he demands one, on the question whether his land will be benefited by the proposed improvement, and if so, as to its extent. *Mascall v. Commissioners of Drainage District*, 620.

JURY. RIGHT OF TRIAL BY JURY. Continued.

2. *In the county court.* The practice and pleadings in all common law cases in the county court are made the same as in the circuit court in similar cases. In the trial of questions of fact in all common law cases in the latter court, either party is entitled to a jury. *Mascall v. Commissioners of Drainage District*, 620.

3. *In the county court at a probate term.* In this case the appeal from the drainage assessment was to a probate term of the county court, which is allowable under the statute, and it was contended that, as there was no jury at a probate term, it was intended the judge, alone, should try the case. But the point was not well taken. The statute expressly provides, that "the court shall have the power to impanel a jury in any case cognizable at the probate terms, as well as at the law terms, whenever it shall be necessary for the trial of any matter pending before the court." *Ibid.* 620.

COMPETENCY OF JUROR.

4. *Who has formed an opinion from rumor and from reading newspapers.* In a capital case a juror, upon his examination as to whether he had formed and expressed an opinion as to the guilt or innocence of the accused, stated that he had formed an opinion based upon rumor or newspaper statements, but that he had expressed no opinion as to the truth of such rumors or statements. He stated upon oath that he believed he could fairly and impartially render a verdict in the case in accordance with the law and evidence. A challenge for cause was overruled, it thereby appearing that the court was satisfied of the truth of his statement. This brought the case exactly within the scope and meaning of the statute prescribing the qualifications of jurors, and established his competency. *Spies et al. v. People*, 1.

5. *Prejudice against crime, as a disqualification.* Upon the trial of several persons on the charge of murder, the crime being the result of an alleged conspiracy to establish anarchy in the place of government, and law and order, the conspirators themselves being anarchists, a person called as a juror, upon his examination, stated that he had a prejudice against socialists, communists and anarchists: *Held*, such prejudice was not a disqualification of the juror to sit in the case. *Ibid.* 1.

STATUTE PRESCRIBING QUALIFICATIONS.

6. *Its constitutionality.* The third proviso of the 14th section of chapter 78, of the Revised Statutes, which provides, "that in the trial of any criminal cause the fact that a person called as a juror has formed an opinion or impression based upon rumor or newspaper statements, (about the truth of which he has expressed no opinion,) shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement," is not obnoxious

JURY. STATUTE PRESCRIBING QUALIFICATIONS. *Continued.*

to the objection that it is in violation of that clause of the constitution which guarantees to the accused party in every criminal prosecution "a speedy trial by an impartial jury." *Spies et al. v. People*, 1.

PEREMPTORY CHALLENGES IN CRIMINAL CASES.

7. *Of the number given to the prosecution.* The statute says: "The attorney prosecuting on behalf of the People shall be admitted to a peremptory challenge of the same number of jurors that the accused is entitled to." Under this statute, in a case where several persons are jointly indicted and put upon trial, each being entitled to twenty peremptory challenges, the prosecution is entitled to a number equal to the aggregate of those accorded to all the defendants. *Ibid.* 1.

ERROR IN RULINGS, AS TO COMPETENCY.

8. *After peremptory challenges are exhausted.* A judgment of conviction in a criminal case will not be reversed for errors committed in the trial court in overruling challenges for cause to jurors, even though the defendant had exhausted his peremptory challenges, unless it is further shown that an objectionable juror was forced upon him and sat upon the case, after he had exhausted his peremptory challenges. *Ibid.* 1.

JURY AS JUDGES OF THE LAW.

9. *In criminal cases.* See CRIMINAL LAW, 52.

LEGISLATURE.

EXERCISE OF JUDICIAL POWERS. See CONSTITUTIONAL LAW, 2.

LIENS.**EXECUTION LIEN.**

1. *As to chattels—when it attaches.* The lien of an execution in the hands of an officer attaches to all property which the debtor may own, or which he may acquire during the life of the execution. If, therefore, goods and chattels become the property of the execution debtor by sale and delivery to him, without the preservation of a lien for the purchase money in the form prescribed by the statute, the execution lien immediately attaches. *Blatchford et al. v. Boyden*, 657.

VENDOR'S LIEN.

2. *Its nature—waiver by taking other security.* A vendor's lien is the creation of courts of equity, based upon the equitable consideration that when the vendor has taken no security and done no act showing an intention to waive the lien, the presumption in such case is, that it is not the intention of the parties that one should part with and the other acquire the title without payment of the purchase price. The lien exists independent of any contract, is personal to the vendor, and whenever it appears that the vendor did not rely upon the lien at the time of the sale, or has subsequently abandoned it as security, it will be held to be waived. *Lehndorf et al. v. Cope*, 317.

LIENS. VENDOR'S LIEN. *Continued.*

3. Where a vendor conveys to another a life estate only, with remainder to the heirs of the grantee in fee, and takes back a mortgage from the holder of the life estate to secure the payment of the unpaid price, the grantor will have no vendor's lien upon the premises sold for the purchase money. *Lehndorf et al. v. Cope*, 317.

4. *Not assignable.* The lien created by implication in favor of a vendor, is personal as to him, and is not assignable or transferable, even by express contract between the vendor and an assignee. It can be enforced only by the vendor himself. *Ibid.* 317.

STATE'S ATTORNEY'S LIEN ON PENALTY.

5. *Under the Pharmacy act.* See FEES AND SALARIES, 1, 2, 3.

LIFE ESTATE. See ESTATES IN LAND, 2, 3, 4.**LIMITATIONS.****WHEN THE STATUTE BEGINS TO RUN.**

1. *On subscription to stock, payable in installments, on call.* Where a contract of subscription to the capital stock of a corporation provides for payments in installments, as from time to time ordered by the board of directors, no cause of action will accrue until an installment is assessed and ordered to be paid. *Great Western Telegraph Co. v. Gray*, 630.

2. A party in 1868 subscribed to the capital stock of a corporation, to be paid for in such installments as might, from time to time, be ordered, and on assessments or calls paid forty per cent of the par value of his stock. The directors failed to make any order for the payment of the balance, and a court of equity, at the suit of creditors, in 1886 made an order of assessment, or call for payment, on the subscription: *Held*, that the limitation as to the unpaid subscription did not commence to run before such order of the court in 1886. *Ibid.* 630.

BILL FOR AN ACCOUNT—ACTION OF ACCOUNT.

3. *An action of account at law, and a bill in equity for an account,* must be brought within five years from the time the right of action accrues, which, in the case of a partnership, is upon the dissolution of the same. *Bonney v. Stoughton et al.* 536.

4. On May 21, 1879, a partnership between A and B was by mutual consent dissolved, and there was an attempt to settle the partnership account which A believed was settled, showing a balance due him. B died December 18, 1881, and A filed his claim for the sum he insisted was found due him on the alleged settlement. On March 1, 1883, the claim was rejected, on the ground there had not been any adjustment of the partnership account, and this judgment was affirmed by the circuit court on November 2, 1884,—about a year and nine months after A's appeal. On January 20, 1885, he filed his bill against B's personal

LIMITATIONS. BILL FOR AN ACCOUNT—ACTION OF ACCOUNT. *Continued.*

representative for an accounting, to which the Statute of Limitations was pleaded. No fraud of any kind was practiced on A: *Held*, that the statute was a bar to the relief sought by the bill. *Bonney v. Stoughton et al.* 536.

NON-SUIT.

5. *As a suspension of the statute.* The clause of the Limitation law which provides that when, during the pendency of a suit, the statutory period of limitation passes, and the plaintiff is afterward non-suited, he may sue again in one year from the time of such non-suit, has no application to a case where judgment is rendered in bar of the plaintiff's suit, even though he had not pursued his proper remedy in the action. *Ibid.* 536.

INTERVENING DISABILITY.

6. *As operating to arrest the running of the statute.* When the Statute of Limitations begins to run it will not be arrested by any subsequent disability, unless expressly so provided in the statute. The death of a debtor will not stop the running of the statute. *Ibid.* 536.

LIMITATION ACT OF 1839.

7. *Good faith.* A deed for land taken with notice that the grantor held the title in trust for another, can not avail as color of title under the seven years' limitation law; but a deed from the latter, while claiming title, to another without notice of the defect in his chain of title, is good color of title under such law. *Dean et al. v. Long et al.* 447.

LACHES.

8. *To whom availing.* The doctrine of *laches* in respect of the assertion of ownership of land, can be invoked only by one in possession against one out of possession. *Bush et al. v. Stanley et al.* 406.

BILL TO CONTEST WILL.

9. *Within what time bill must be exhibited.* See **WILLS**, 3, 4.

MALICE.**PRESUMPTION.**

In case of injury to another. See **CRIMINAL LAW**, 38.

MARRIAGE LICENSE.**CAPACITY IN WHICH OFFICER SIGNS.**

1. *As the county clerk is also the clerk of the county court*, the fact that the county clerk signs the marriage license as clerk of the county court, will not affect its validity. *Tucker v. People*, 583.

MARSHALING ASSETS.**PURCHASERS OF LAND.**

Subject to incumbrance—of sales in parcels. See **PURCHASERS**, 1.

MEASURE OF DAMAGES.**PERSONAL INJURY.**

1. *Resulting from negligence.* In case of personal injury from negligence, the injured party may recover such actual damages as are the natural and proximate result of his injury, such as his loss of time, his pain and suffering, his necessary and reasonable expenses in medical and surgical aid and nursing, as shown by the evidence; and if the injury is permanent and incurable, the jury, in assessing the damages, may take such fact into consideration. The fact that he has a wife living, can not, however, be considered by the jury in fixing the plaintiff's damages. *Chicago and Eastern Railroad Co. v. Holland*, 461.

UNDER EMINENT DOMAIN ACT.

2. *As to lands taken—as to lands not taken.* See EMINENT DOMAIN, 6 to 10.
3. *As to proximate and remote damages.* Same title, 11.
4. *Of an instruction—whether permitting remote or speculative damages.* Same title, 12.

MINES AND MINING.**UNDERGROUND PLANES OR GANGWAYS.**

1. *Providing signals and places of refuge—the statute construed.* Section 8, of chapter 93, of the Revised Statutes, entitled "Miners," providing that "all underground, self-acting or engine planes or gangways on which coal cars are drawn and persons travel, shall be provided with some proper means of signaling between the stopping places and the end of said planes or gangways, and sufficient places of refuge at the sides of such planes or gangways shall be provided at intervals of not more than twenty feet apart," applies to all underground, self-acting or engine planes, and also to all underground gangways on which coal cars are drawn and persons travel, whatever the motive power may be. *Sangamon Coal Mining Co. v. Wiggerhaus*, 279.

2. *Negligence—personal injury—the rule, as at common law.* See NEGLIGENCE, 1.

MISTAKE.**PROPER DILIGENCE REQUIRED.**

1. In the absence of fraud or concealment, before a court of equity will interfere because of the mistake of a party, even as to a matter of fact, the mistake must be such as the exercise of ordinary diligence would not have prevented. If he seeks to be relieved from the effect of his *laches* and neglect to ascertain his rights before the Statute of Limitations has barred him, he should show that his mistake as to his rights and remedy was without negligence on his part. *Bonney v. Stoughton et al.* 536.

MISTAKE. Continued.**MISTAKE AS TO THE LAW.**

2. While mistake is an independent head of equity jurisdiction, it has been repeatedly held that a mistake or misapprehension of the law will not entitle a party to relief. To this rule there are exceptions, comprising a large class of cases, where a person has acted in respect of his property or estate under a misapprehension of his existing legal right or liability. *Bonney v. Stoughton et al.* 536.

IN DESCRIPTION OF LAND.

3. *Being other than the land sold—mortgagee of the grantee without notice.* Where a party owning five forty-acre tracts, lying in a line north and-south, sold the north forty-acre tract, but by mistake in his deed conveyed the south forty-acre tract, having the same description as the tract sold, except being in another section, and the grantee mortgaged the tract so conveyed to him, and the grantor afterward filed his bill to set aside such mortgage as a cloud on the title of his south forty acres, it was *held*, that he was not entitled to the relief sought, without showing that the mortgagee took his mortgage with a knowledge of the grantor's rights, or under such circumstances as to put him upon inquiry in respect of such right. *Yeck v. Crum*, 267.

OF NOTICE TO MORTGAGEE.

4. *Possession, whether sufficient notice—examination of record sufficient.* The owner of several forty-acre tracts of land, lying together, sold one of them, but by mistake conveyed another one of the tracts. The grantee took possession of the tract in fact sold, and the grantor continued in the possession of the tract conveyed. The grantee, in giving a mortgage, described the land as in his deed. Afterward he borrowed \$1000 to take up this mortgage, and gave a similar mortgage to secure the same. He informed the second mortgagee that the land was that conveyed to him, and by him mortgaged to the first mortgagee. The second mortgagee examined the record, and found the legal title in such party, subject to the prior mortgage. The second mortgagee knew that the mortgagor resided on one of the forty-acre tracts, and that his grantor resided on another, but was not acquainted with their location by their numbers, and had no actual notice of the mistake in the deed: *Held*, that the mortgagee, in examining the records, exercised all the care and made all the inquiry that could reasonably be expected of him, and that he should not lose his debt on account of the mistake in the original deed. *Ibid.* 267.

THIRD PERSONS PROTECTED.

5. *As against the mistake or fraud of another.* It is a fundamental doctrine of equity that where one of two persons must suffer by the fraud of a third person, the loss must fall upon him who, by his negligence or conduct, put it in the power of such third person to cause the injury. So when a party, by mistake in his deed, conveys a tract of his land not intended, and his grantee, in ignorance of such mistake,

MISTAKE. THIRD PERSONS PROTECTED. *Continued.*

incumbers the land conveyed, and afterward the grantee conveys the tract he in fact bought, and the original grantor, in violation of an agreement with the mortgagee, makes a conveyance of the right tract, which inures to the benefit of the second purchaser, and takes back from his grantee a deed for the land actually conveyed, so that the mortgagee can not have his mortgage placed upon the proper tract, such grantor can not, in a court of equity, have the mortgage set aside as a cloud on his title, but must suffer the loss caused by his own conduct. *Yeck v. Crum*, 267.

MORTGAGES AND DEEDS OF TRUST.**MORTGAGE BY GRANTEE FOR PURCHASE MONEY.**

1. *As embracing a less estate than that conveyed.* The owner of land conveyed the same to a married woman, "and her heirs by her present husband," she having at the time two such heirs, and she and her husband at the same time executed to the grantor a mortgage of the premises to secure a part of the purchase money not paid, evidenced by the wife's notes, and the mortgagee sold and assigned the same: *Held*, on bill by the assignee to foreclose, that the mortgage was limited to the life estate of the wife, and created no incumbrance on the remainder which vested in the heirs. *Lehndorf et al. v. Cope*, 317.

2. While it is true that a deed for land, and a mortgage of the same date taken for the purchase money, are but parts of a single transaction, nevertheless, one estate may be conveyed by the deed and a wholly different interest by the mortgage. If the vendor sees fit to take security by mortgage upon less than the whole land sold, or upon less than the estate conveyed, the contract will be valid, and the residue of the land or estate will pass by the deed, unencumbered by any lien in his favor. *Ibid.* 317.

PRIOR AND JUNIOR INCUMBRANCERS.

3. *Adjustment of equities between them—and when priority of right is lost.* A junior incumbrancer, acting in his own interest, and to accomplish a purpose of his own by doing something to make his own security available,—as, in defeating the lien of a prior deed of trust on the same property,—will not thereby be entitled to any superior equity over another incumbrancer whose lien was subject to that so defeated, but prior to the contesting creditor, or be entitled to be re-imbursted for the expenses in defeating the first lien, when the intervening creditor, who is thereby benefited, has not requested or induced the junior creditor to do so. If the latter had discharged the prior lien by payment, in order to save himself, a different rule would apply. *McCor-mick et al. v. Bauer et al.* 573.

4. Where a mortgagee transfers the notes secured, and makes a written assignment of the mortgage, which assignment is not recorded until after the mortgagor makes a conveyance of the mortgaged prem-

MORTGAGES AND DEEDS OF TRUST.**PRIOR AND JUNIOR INCUMBRANCES. *Continued.***

ises to the mortgagee, and the latter executes another mortgage of the same, which deed and subsequent mortgage are first recorded, the last mortgage will take precedence of the first; but another mortgage or deed of trust executed by him after the recording of the assignment of the first mortgage, will be subject thereto. *McCormick et al. v. Bauer et al.* 573.

CHATTEL MORTGAGES.

5. *Necessity of recording purchases, etc., with actual notice.* Under our statute, the recording of a chattel mortgage is as essential to its validity, as against third persons, as any other element entering into the making of a valid chattel mortgage. It is a valid lien only from the time of its being filed for record, even as against purchasers and creditors with actual notice. *Blatchford et al. v. Boyden*, 657.

6. *How to preserve the lien.* As against third persons, creditors or purchasers, the lien of a chattel mortgage can be preserved in only two ways: by the mortgagee taking and retaining possession of the property, or, if the mortgagor is to retain possession, then by the recording of a properly executed and acknowledged chattel mortgage providing for such possession. *Ibid.* 657.

7. *Notice of the rights of parties, and what rights.* Under the laws of this State, chattel mortgages are required to be filed and recorded in the recorder's office of the county; and they, from the date of their filing for record, are notice to all subsequent purchasers and incumbrancers, of the rights of the mortgagee thereunder in the property mortgaged, although it may be annexed or attached to real estate. *Sword v. Low*, 487.

MUNICIPAL CORPORATIONS.**ESTOPPEL.**

1. *As to acts or promises of officers or agents.* See ESTOPPEL, 2.
2. *Whether by deed, not accepted.* Same title, 3, 4.

MURDER.

DEFINED—MALICE PRESUMED. See CRIMINAL LAW, 38.

NAME.**VARIANCE.**

Middle letter, whether part of a name. See CRIMINAL LAW, 51.

NEGLIGENCE.**PERSONAL INJURY.**

1. *Rule, as at common law.* In an action on the case by a miner, to recover for a personal injury while working in a coal mine, the court instructed the jury, that if the defendant company knowingly, negli-

NEGLIGENCE. PERSONAL INJURY. *Continued.*

gently, etc., failed to keep its doors across its gangways, and the gangways themselves, in reasonably safe condition and repair, and by reason thereof the plaintiff was injured, as alleged, they should find for the plaintiff: *Held*, that the instruction was proper, as laying down the rule of liability for negligence at the common law, and did not attempt to lay down the rule under the statute. *Sangamon Coal Mining Co. v. Wiggerhaus*, 279.

FELLOW-SERVANTS.

2. *Who so regarded—as determining the liability of the common master.* See FELLOW-SERVANTS, 1, 2, 3.

NEGOTIABLE INSTRUMENTS.**LIABILITY OF INDORSER.**

1. *By what law governed.* Where promissory notes are made and indorsed in another State, the law of that State will govern as to the indorser's liability. *Dunnigan v. Sterens*, 396.

2. *Character of liability under the law merchant.* Under the law merchant, the indorsement of a note amounts to a contract on the part of the indorser, that if, when duly presented, the note is not paid by the maker, the indorser will, upon due and reasonable notice given him of the dishonor, pay the same to the indorsee or other holder. *Ibid.* 396.

3. *Waiver of presentment and notice, as qualifying character of liability of indorser.* Under the law merchant in force in the State of Indiana, applicable to a note payable in a bank of that State, where there is an express waiver, in writing, by the indorser, of presentment for payment and of notice of its non-payment, the indorser's obligation for its payment is unconditional and absolute, and on the maturity of the note the holder may immediately bring suit against the indorser, without performance of any act. *Ibid.* 396.

4. An indorser may, by the form of his indorsement, make himself absolutely and positively, in all events, liable for the payment of the note, with or without due presentment or due notice of non-payment. If there is an agreement, in writing, to dispense with any demand upon the maker, or with notice of dishonor, the language will be construed to import an absolute dispensation with the ordinary conditions of an indorsement, and the indorser will become as absolutely bound to pay the same, when due, as if a guarantor or surety. *Ibid.* 396.

NEW TRIALS.**IMPROPER REMARK OF JUROR.**

1. On the trial of an action against a railway company to recover damages for a personal injury alleged to be the result of negligence, while defendant's counsel was stating the case to the jury, and what

NEW TRIALS. IMPROPER REMARK OF JUROR. *Continued.*

the evidence would show, one of the jurors said, "That won't help you a bit,—that will not do you any good." Held, that while the remark was improper, and the juror deserved a small fine, yet the irregularity was not such as to require the reversal of a judgment in favor of the plaintiff. *Chicago and Eastern Railroad Co. v. Holland*, 461.

REMARKS OF THE COURT.

2. *Upon the evidence.* See PRACTICE, 8.

NON-RESIDENT DEBTORS.**VOLUNTARY ASSIGNMENT.**

Whether enforceable here—and of preference among creditors. in a foreign voluntary assignment. See INSOLVENT DEBTORS, 1 to 4.

NORMAL UNIVERSITY.**ITS CHARACTER.**

1. *Whether a State institution or a private corporation.* The Normal University located at Normal, in this State, is not a public State institution, but is a private eleemosynary corporation, and it can not be deprived of its property by mere legislative enactment intended to transfer the same to another without due process of law. *Board of Education v. Bakewell*, 339.

NOTICE.**RECITALS IN PRIOR DEED.**

1. In all cases where a purchaser of land can not make out a title except by a deed which leads him to another fact, whether by description of the parties, recital or otherwise, he will be chargeable with notice of such other fact. So where his grantor's title papers show that he has only an estate in trust for another, the purchaser will take subject to such trust. *Dean et al. v. Long et al.* 447.

FIXTURES—CHATTELS ANNEXED TO REALTY.

2. *Notice to purchaser.* *Quare,* whether the character of a fixture or chattel annexed to real estate, as fixed by the express agreement of the parties, will be changed in favor of a subsequent purchaser or incumbrancer of the realty, in case he has no notice of such agreement. *Sword v. Low*, 487.

NOTICE TO AGENT.

3. *As notice to the principal—in the case of corporations.* When a duty is imposed upon and intrusted to an agent by a corporation, notice to such agent of matters falling within his line of duty is notice to the corporation. *Sangamon Coal Mining Co. v. Wiggerhaus*, 279.

CHATTEL MORTGAGE.

4. *After recording—notice of the rights of parties, and what rights.* See MORTGAGES AND DEEDS OF TRUST, 5, 6, 7.

NOTICE. *Continued.***MISTAKE IN DESCRIPTION.**

5. *In conveyance of land, being other than the land sold—rights of mortgagee of the grantee without notice.* See MISTAKE, 3.

POSSESSION AS NOTICE.

6. *Of notice to mortgagee—possession, whether sufficient—examination of record sufficient.* Same title, 4.

NEGOTIABLE INSTRUMENTS.

7. *Notice of dishonor—and waiver thereof.* See NEGOTIABLE INSTRUMENTS, 2, 3, 4.

OFFICERS DE FACTO.**VALIDITY OF THEIR ACTS.**

1. *Of officers acting under law which is not constitutional.* The acts of *de facto* officers under color of legal title to the offices the duties of which they are assuming to perform, are valid as to the public, and so far as they concern the rights of third persons who have an interest in their acts done. *Leach v. People ex rel. Patterson*, 420.

2. The legislature passed an act which proved to be in violation of the constitution, whereby the management of the affairs of a county acting under township organization was attempted to be taken from the supervisors of the several towns, and vested in a board of supervisors consisting of only five members, instead of fifteen, as before, to be elected in five districts, and hold their offices for four years. Supposing the act to be a valid enactment, such board of five were elected, and for a time acted without question, as the legally constituted tribunal having charge of the county affairs: *Held*, that their acts were valid and binding as those of *de facto* officers under color of office. *Ibid.* 420.

OFFICIAL BONDS.**LIABILITY OF SURETY.**

1. A surety is not to be held beyond the precise terms of his contract. His liability is *strictissimi juris*, and can not be extended by construction. *People, use, etc. v. Toomey et al.* 308.

2. Where the term of an officer is for a definite or fixed period, the surety on his bond is only liable for his faithful performance of his duties during that period. If the bond is silent as to the length of the term, but the statute under which the bond is given fixes the term, the statute, in that regard, will be taken as a part of the contract. *Ibid.* 308.

3. *Liability on county clerk's bond.* The condition of a county clerk's bond was, that he should "perform all the duties which are or may be required by law to be performed by him as county clerk of the said county of L., in the time or manner prescribed by law or to be prescribed by law." After the expiration of his term of office the clerk

OFFICIAL BONDS. LIABILITY OF SURETY. *Continued.*

made a report to the county board, showing in his hands, of fees collected, the sum of \$414 over and above his compensation as fixed by the board, and his clerk hire and other expenses of the office, which amount he paid into the county treasury. At the same time he presented a bill for services rendered to the county in his capacity as clerk, which the board allowed, and on the order issued therefor he drew a considerable sum, to which he was not entitled. Failing to pay this sum back into the county treasury, suit was brought on his official bond: *Held*, that his sureties were not liable for his failure to pay such sum of money. *People, use, etc. v. Toomey et al.* 308.

PARTIES.**IN CHANCERY.**

1. *Generally.* In equity, all persons materially interested in the subject matter of the suit, and who will be directly affected by the decree sought, must be joined as parties, either as complainants or defendants. *Howell v. Foster*, 276.

BILL TO ENJOIN EXECUTION SALE.

2. *On bill by purchaser of land to enjoin sale under execution against a former owner.* On bill by a purchaser of land from a judgment debtor, to enjoin the sheriff from selling such land under executions against the former owner, on the ground that the judgments had ceased to be a lien on the land by lapse of time, in order to the proper presentation of that question the plaintiffs in the executions are necessary parties. *Ibid.* 276.

IN SUIT AGAINST A CORPORATION.

3. *To appoint a receiver, etc.—whether stockholders are necessary parties.* It is a well established general rule, that a court of equity acquires jurisdiction to appoint a receiver of corporate assets by service of process upon the corporation. The stockholder, unless so required by statute, is not a necessary party. His interest is represented by the presence of the corporation. *Great Western Telegraph Co. v. Gray*, 630.

4. *Former decisions—distinguished.* The cases of *Chandler v. Brown*, 77 Ill. 333, and *Lamar Ins. Co. v. Gulick*, 102 id. 41, holding it necessary to make a stockholder of a corporation a party before he could be bound by a decree winding up the corporation, were decided under section 25 of the act of 1872, relating to corporations, which required the stockholders to be made parties, and those cases not to be taken as authority to govern in any other case than in one under such a statute. *Ibid.* 630.

IN REPLEVIN.

5. *Against an officer.* Where goods levied on under an execution are replevied, the officer having their legal custody is the proper person

PARTIES. IN REPLEVIN. *Continued.*

to be made a defendant. The plaintiffs in the execution are not necessary, or even proper, parties to the suit. *Blatchford et al. v. Boyden*, 657.

IN SUIT ON REPLEVIN BOND.

6. *As to identity of person for whose use the suit is brought.* In replevin against a sheriff for goods levied on by him under an execution, the bond is properly made to the coroner, and, upon condition broken, that officer may sue thereon for the use of any person damaged by the wrongful suing out of the writ, or by the failure of the plaintiff to return the property as awarded. And when the plaintiff in execution is also made defendant in replevin, and named as a defendant in the replevin bond, he may be joined as one in use with the sheriff; but the right to enforce the entire liability being in the sheriff, the plaintiff in execution being joined as defendant in the replevin suit, or as a usee in the suit on the bond, can in no way affect the sheriff's right of recovery, or add to the liability of the obligors in the bond, and hence describing such plaintiff in execution as the assignee of a wrong person will not defeat a recovery or afford ground to exclude the bond. *Ibid.* 657.

7. A sheriff levied an execution in favor of A, as assignee of the estate of B, upon goods, when a third person replevied the same in an action against the sheriff, and A, as assignee of the estate of C, who was described in the same way in the replevin bond: *Held*, that in an action on the bond, by the coroner, for the use of the sheriff, and A, assignee of the estate of B, the coroner might, by apt averment, and proof of the misdescription of A, recover upon the bond, for the use of the party damaged. *Ibid.* 657.

PARTNERSHIP.**TORTS OF PARTNERS.**

1. *Liability therefor.* A partnership firm is liable to others for the tortious acts as well as the contracts of its members within the scope of the partnership. *Wiley v. Stewart*, 545.

PATENT FOR LAND.

AS PARAMOUNT TITLE. See EVIDENCE, 8.

PERFORMANCE.**OF PAROL AGREEMENT.**

1. *For the conveyance of land—to take the case out of the Statute of Frauds.* See STATUTE OF FRAUDS, 1; CHANCERY, 6, 7, 8.

2. *Taking possession, as an element in performance.* Same title, 2, 3.

PLEADING AND EVIDENCE.**ALLEGATIONS AND PROOFS.**

1. *Must correspond—on bill to remove cloud upon title.* On bill to set aside certain tax deeds as clouds on the title of complainant, it is error to set aside any tax deeds other than those described in the bill as affecting the title. A complainant must stand or fall by the case he makes in his bill. *Gage v. Curtis et al.* 520.

2. The validity of a tax deed, not described in a bill to remove clouds on the title to land, can not be insisted upon by the defendant as a defense to the suit, and much less can it be considered and condemned at the instance of the complainant, when no relief is asked in respect to it. *Ibid.* 520.

3. *On bill to foreclose lien for taxes.* A bill to foreclose a lien on land for taxes, alleged that the lands were forfeited to the State for the taxes for the years 1878 and 1879, giving a statement for each year, and then averred that "the full amount now due upon said lands and lots, as shown upon the collector's books of the year 1880, for taxes, penalties, interest and costs, including said forfeitures for the years 1878 and 1879, and accrued taxes for 1880, is the sum of \$3687.40," and that the amount which was a lien upon each tract and lot separately, is shown by said books, and said copy attached, opposite to each tract and lot, separately and respectively: *Held*, that such averment was sufficient to admit proof of the amount of taxes due and unpaid for the years 1875, 1876 and 1877, the collector's books (a copy of which was made an exhibit) being *prima facie* evidence of the amount of the taxes, and they being properly included in the taxes of 1880. *Mix et al. v. People*, 641.

POSSESSION.**POSSESSION OF LAND.**

1. *As notice of occupant's rights.* See MISTAKE, 4.

AS AN ELEMENT OF PERFORMANCE.

2. *To take the case out of the Statute of Frauds.* See STATUTE OF FRAUDS, 2, 3.

PRACTICE.**TIME TO OBJECT.**

1. *As to competency of evidence.* When it is desired to object to the receiving in evidence, in a criminal prosecution, of a letter purporting to have been written to the defendant, on the ground that it came into the hands of the prosecution by means of an unlawful seizure, the objection should be taken at the trial. It can not be made for the first time on error, in this court. *Spies et al. v. People*, 1.

2. And in taking such an objection at the trial, the ground of it not appearing on the face of the offered evidence, but depending upon proof of an outside fact, the party objecting should prove that the letter was

PRACTICE. TIME TO OBJECT. *Continued.*

obtained by illegal seizure, and then move its exclusion, or oppose its admission, upon that ground. In that way the question of its admissibility could be raised. *Spies et al. v. People*, 1.

3. *Certificate to transcript on change of venue.* Where a change of venue is granted in a criminal case on the application of the defendant, if the authentication of the record by the clerk of the court from which the change is taken, is defective or informal, the objection thereto should be made by him to the court before the trial, or it will be considered as waived. *Tucker v. People*, 583.

WHEN SPECIFIC OBJECTION REQUIRED.

4. *As to admissibility of evidence.* The objection to the admission of a record of a former conviction of one charged with crime, that the defendant is not identified as the person formerly convicted, should be specifically made on the trial, so that it might be obviated by other proof. A general objection will not save the point in this court. *Sullivan v. People*, 385.

5. On the trial of an action to recover damages for a personal injury, the plaintiff proved the amount he had paid and incurred for medical treatment, which was objected to as "incompetent, immaterial and irrelevant." Held, that it could not be assigned for error that the evidence should not have been admitted without proof that the physicians for whose services the expense was incurred, were entitled to practice, as that objection, if tenable, might have been obviated on the trial, if specifically made. A specific objection, which may be obviated, must be made on the trial before it can be urged on appeal. *Chicago and Eastern Railroad Co. v. Holland*, 461.

ALLOWING FURTHER EVIDENCE.

6. *After argument has commenced.* The admission of further evidence on the part of the prosecution in a criminal case, after the case is closed and before the jury retires, is a matter resting in the sound discretion of the court; and when that discretion is not abused, the admission of such evidence can not be assigned for error. *Tucker v. People*, 583.

7. On a trial for bigamy, after the evidence was closed and the State's attorney had opened the argument to the jury, and defendant's counsel had addressed the jury, the court took a recess. On the reconvening of the court, on motion of the State's attorney, the court allowed him to read in evidence certain portions of the statute of another State, and offered to allow the defendant the privilege of introducing further evidence, and to further argue the case to the jury: Held, no error. *Ibid.* 583.

REMARKS OF THE COURT.

8. *As to the evidence.* On the trial of an action for a personal injury, during the examination of a physician as to his opinion in regard

PRACTICE. REMARKS OF THE COURT. *Continued.*

to some of the theories advanced by medical writers, the defendant's counsel read a long quotation from a medical work, and asked the opinion of the witness as to the correctness of the extract, when the court remarked: "I have a book written in Spanish, by a Mexican lawyer, and I may as well read that to him (witness) as your reading medical books to them." *Held*, that as this was no ruling on the admission or exclusion of evidence, and it not appearing to have injured any one, the defendant could not complain. *Chicago and Eastern Railroad Co. v. Holland*, 461.

AFTER REVERSAL AND REMANDMENT.

9. *What proceedings allowable in the trial court.* This court reversed a decree on bill to foreclose a lien on lands for taxes, and remanded the cause with directions to the circuit court to ascertain the amount of taxes due on each tract of the land, and enter a decree in conformity to the opinion pronounced: *Held*, that the circuit court, on the return of the case, had no authority to enter upon a general investigation of all matters and things which the defendants might desire to present, and that the court had but one duty to perform, which was to ascertain the amount due on each tract, and enter a decree in conformity to such finding. The validity of the assessments upon which the taxes were levied, and the legality of some of the taxes which were before the court on the former hearing, could not be again questioned. *Mix et al. v. People*, 641.

LIMITING NUMBER OF WITNESSES.

10. *In proceedings under Eminent Domain act.* See COSTS, 3.

11. *Time of application to limit number of witnesses whose fees may be taxed—and how far discretionary.* Same title, 4, 5.

ARREST OF JUDGMENT.

12. *After demurrer to declaration overruled.* See ARREST OF JUDGMENT, 1.

PRACTICE IN THE SUPREME COURT.**ERROR WILL NOT ALWAYS REVERSE.**

1. *Improper instructions.* A modification of an instruction as to one point in a case, even if erroneous, is no ground of reversal, where it is evident that it worked no injury to the party complaining, as, where the jury must have found against him on another ground. *Blatchford et al. v. Boyden*, 657.

2. *Refusal of change of venue—ground of application obviated.* The error, if any, in overruling a motion for a change of venue on account of the prejudice of the judge of the court, is rendered harmless by the case being tried by another judge of the same court. An error working no harm is no ground of reversal. *Mix et al. v. People*, 641.

PREFERENCE AMONG CREDITORS.**INVOLUNTARY ASSIGNMENT.**

By non-resident debtor—of the application of prohibitory statute of this State. See INSOLVENT DEBTORS, 3, 4.

PUBLIC ASSEMBLAGES.**DISPERSAL THEREOF BY POLICE.**

Right of resistance. See CRIMINAL LAW, 39, 40.

PURCHASER.**SUBJECT TO INCUMBRANCE.**

1. *In case of sales in parcels where incumbrance is on an entire tract—marshaling assets.* A land company bought a tract of land, the purchase money of which was unpaid by its grantor, and which was an incumbrance to be paid by the company. The company laid the land out in lots, many of which it sold, and conveyed by warranty deeds. The original purchase money not being paid, a bill was filed by the holder of the incumbrance to have the property sold: *Held*, that the purchasers of the lots were entitled to have an account taken of all that had been paid, and for the payment of the balance to have the unsold lots of the company first sold, and should there still remain a balance due, to have the other lots sold in the inverse order of their alienation. *Allen et al. v. Jackson et al.* 567.

RAILROADS.**DUTY TO FURNISH TRANSPORTATION.**

1. *As to coal not yet mined.* The statute, which provides that "every railroad corporation in the State shall start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or offered for transportation," can not be so extended as to include coal in the earth, to be dug and raised from the mines after cars are furnished, so that the carrier, for any neglect in that regard, will be subject to the treble penalty provided in the statute. *People, use, etc. et al. v. Illinois and St. Louis Railroad and Coal Co.* 506.

TAXATION OF RAILROAD PROPERTY.

2. *And assessment therefor.* See TAXATION AND TAX TITLES, 8 to 12.

USE OF STREETS.

3. *Whether right exclusive, or jointly with the public.* See STREETS, 3, 4.

REAL PROPERTY.**OF ESTATES THEREIN.** See ESTATES IN LAND, 1 to 6.**REASONABLE DOUBT.****IN CRIMINAL CASES.** See CRIMINAL LAW, 49, 50.

RECEIVER.**CORPORATIONS.**

1. *Power of court to appoint—to collect unpaid subscriptions.* A court of equity has jurisdiction to appoint a receiver for a corporation when its board of directors are guilty of mismanagement and malfeasance, and order him, by suit in the corporate name, to collect unpaid subscriptions to the capital stock, by service of process, alone, on the corporation. And in an action so brought by him, the validity of the decree appointing the receiver can not be questioned by the defendant stockholder. *Great Western Telegraph Co. v. Gray*, 630.

RECORDING LAW.

AS APPLIED TO CHATTTEL MORTGAGES. See MORTGAGES AND DEEDS OF TRUST, 5, 6, 7.

REMEDY.**TO RECOVER ON JUDGMENT OF CONDEMNATION.**

Under a special assessment. See ACTIONS AND DEFENCES, 2.

REMOVAL OF CAUSES.**FROM STATE TO FEDERAL COURT.**

1. *In proceeding under Eminent Domain act, as between two railroad companies.* In a proceeding to condemn a right of way by a railway company over lands held by the Illinois Central Railroad Company, partly under grant of the United States and partly by condemnation, the latter company moved the court to transfer the cause to the Circuit Court of the United States, on the ground that it owed duties to the United States which it could not discharge efficiently if its right of way was taken, which motion was overruled: *Held*, that there was no error in refusing to so transfer the cause to the United States court. *Illinois Central Railroad Co. v. Chicago, Burlington and Northern Railroad Co.* 473.

REPLEVIN.**RETURN OF PROPERTY.**

1. *To whom property is to be returned on writ of retorno habendo.* Where goods levied on by a sheriff, and held by him under an execution, are taken from his custody by writ of replevin, they can be rightfully returned to him alone upon a writ of *retorno habendo*. The plaintiffs in the execution having never had the goods in possession are not entitled to have return thereof made to them, but they must be returned to the sheriff, to be applied in satisfaction of the execution in his hands. *Blatchford et al. v. Boyden*, 657.

PARTIES.

2. *In replevin against an officer.* See PARTIES, 5.

RES JUDICATA. See FORMER ADJUDICATION, 1 to 4.

RESCISSION OF CONTRACTS. See CONTRACTS, 5, 6, 7.

RESULTING TRUST. See TRUSTS AND TRUSTEES, 9, 10, 11.

RIGHT OF TRIAL BY JURY.

ON APPEAL FROM ASSESSMENT.

Under Drainage law. See JURY, 1, 2, 3.

SEPARATE TRIAL.

IN CRIMINAL CASES. See CRIMINAL LAW, 46.

SERVICE BY PUBLICATION.

TIME OF PUBLICATION.

1. *In a Utah divorce case.* The record of a decree of divorce in the probate court of Utah Territory showed service on the defendant by publication, the first insertion of which in the paper was only thirty-five days before the date of the decree, while the law of that territory given in evidence required that forty days should intervene: *Held*, that the decree was void for want of jurisdiction. *Tucker v. People*, 583.

SPECIAL ASSESSMENT.

REMEDY.

To recover on judgment of condemnation. See ACTIONS AND DEFENCES, 2.

SPECIAL LEGISLATION.

UNDER CONSTITUTION OF 1848.

1. *Township organization and the county court—management of county affairs.* Section 6, of article 7, of the constitution of 1848, which provides that "the General Assembly shall provide, by a general law, for a township organization," etc., relates to the management of the affairs of the several towns of counties adopting the system, and not to the management of the fiscal affairs of counties. *Leach v. People ex rel. Patterson*, 420.

2. The constitution of 1848 provided that as to such counties as might adopt the township organization, the General Assembly *might* dispense with the county court for the management of the county fiscal concerns, and the affairs of such counties *might* be transacted in such manner as the General Assembly should provide. In this the legislature was not restricted to general laws. *Ibid.* 420.

3. The adoption of the township system did not necessarily, under this constitutional provision, do away with the county court for the transaction of county business. The management of the county affairs might still be left to the county court, or intrusted to any other tribunal created for that purpose. *Ibid.* 420.

SPECIFIC PERFORMANCE. See CHANCERY, 5 to 8.

STARE DECISIS. See FORMER ADJUDICATION, 3.

STATE AND FEDERAL JURISDICTION. See CRIMINAL LAW, 41 to 44.

STATUTES.

OF THE TITLE.

1. *As expressing the purpose of the act—county board of Wayne county.* The act entitled "An act to change the time of electing certain officers in a county therein named," approved February 28, 1867, is in violation of section 23, of article 3, of the constitution of 1848, in not having its subject or main object expressed in its title. The main subject of the act in question was, the change of the composition of the board of supervisors in Wayne county,—to diminish the number of the members of the board as provided by the general Township Organization law, and to change the mode of their election, from towns singly, to groups of towns. This subject was not expressed in the title, nor was it in any way germane to the purpose which was expressed in the title. *Leach v. People ex rel. Patterson*, 420.

RULE OF CONSTRUCTION.

2. *To give effect to every provision thereof.* A statute should be construed in such manner that all its parts will not only be consistent with each other, but that every provision thereof shall be given its proper effect, so that nothing therein shall appear to be superfluous or redundant. *Illinois Central Railroad Co. v. Chicago, Burlington and Northern Railroad Co.* 473.

STATUTES CONSTRUED.

3. *Mines and mining—underground planes and gangways—providing signals and places of refuge.* The provision in section 8, of chapter 93 of the Revised Statutes, entitled "Mines," that "all underground, self-acting or engine planes or gangways on which coal cars are drawn and persons travel, shall be provided with some proper means of signaling between the stopping places and the end of said planes or gangways, and sufficient places of refuge at the sides of such planes or gangways shall be provided at intervals of not more than twenty feet apart," applies to all underground, self-acting or engine planes, and also to all underground gangways on which coal cars are drawn and persons travel, whatever the motive power may be. *Sangamon Coal Mining Co. v. Wiggerhaus*, 279.

4. *Duty of railroads to furnish transportation—the statute construed in People, use, etc. v. Illinois and St. Louis Railroad and Coal Co.* 506. See RAILROADS, 1.

5. *Usury—statute abolishing penalties for non-payment at maturity—construed in Barton v. Farmers and Merchants' National Bank*, 352. See USURY, 1, 2.

STATUTE OF FRAUDS.**PAROL PURCHASE OF LAND.**

1. *Performance to take a case out of the statute.* In case of a parol purchase of land, where the purchase money has been paid, possession given to the purchaser, and he enters under the contract, and makes lasting and valuable improvements, a specific performance will be enforced, although the Statute of Frauds may be pleaded. *Gorham et al. v. Dodge*, 528.

2. *Taking possession, as an element in performance.* Full payment of the purchase money for real estate verbally agreed to be conveyed, is not, of itself, sufficient to take the agreement out of the Statute of Frauds. Possession must also be taken under the contract. *Ibid.* 528.

3. An aged mother offered to give her daughter her homestead if the latter would come there and live with her as long as she lived, the mother to furnish the home, provide for the house, and bear all the expenses, so that the daughter should be at none whatever. Under this offer they both went to the homestead, where they lived until the mother's death, the daughter paying no taxes and making no improvements: *Held*, that the daughter did not thereby acquire possession of the property, during the mother's life, so as to take the case out of the Statute of Frauds. *Ibid.* 528.

4. *Acts relied on to show part performance* will not operate to defeat the operation of the Statute of Frauds, unless they are done under the contract itself. If they might have been done with other views, they will not take the case out of the statute. It must appear that the party entered into possession of the land under the contract, and in performance of it, and that he was allowed to make valuable and permanent improvements under his contract of purchase, and not otherwise. If the acts are referable to a tenancy, they will not do. *Clark et al. v. Clark*, 388.

ABUSE OF TRUST BY AN AGENT.

5. If an agent employed by another to look up the title to a tract of land, and purchase the same, conceals information acquired by him, and takes the title in his own name, denying his agency and employment, a court of equity will compel him to convey the land to his principal, although he may plead the Statute of Frauds in defence. *Valette v. Tedens*, 607.

STREETS.**VACATING STREETS.**

1. *By what authority—and of the mode.* A public street or alley in a city can be vacated or closed only by the city council, and by it only upon a three-fourths majority vote of all the aldermen authorized by law to be elected, to be taken by ayes and noes, and entered upon the record of the proceedings of the council or board. *St. Louis, Alton and Terre Haute Railroad Co. v. City of Belleville*, 376.

STREETS. VACATING STREETS. *Continued.*

2. So a railway company, relying upon a resolution of the common council of a city vacating or allowing the closing of a portion of a public street, must see that such resolution or order has been adopted by the required vote, and entered upon the record of the proceedings of such common council. If such company closes up or obstructs a street not legally vacated, it may be held liable for the obstruction. *St. Louis, Alton and Terre Haute Railroad Co. v. City of Belleville*, 376.

USE OF STREETS BY RAILROADS.

3. *Whether right exclusive, or jointly with the public.* Where the joint use of a public street is granted to a railway company with the public, and its right is not exclusive in any portion thereof, the company may be properly convicted of a breach of an ordinance against obstructing streets and their crossings by locomotives and cars. *Ibid.* 376.

4. An ordinance or resolution of a city appropriated certain streets to a railway company, "so far as the said company may require to appropriate the same in crossing them, in the construction of their railroad track, switches, turn-tables, etc., and other machinery and fixtures to be used or employed by them in operating their said road, subject, however, to this proviso: that the same shall be occupied with as little detriment and inconvenience to the public as possible," and requiring the crossings to be so graded as to make any embankments that should be made, no obstruction: *Held*, that this was but a provision for a joint use with the public having occasion to use the streets by other modes of travel. *Ibid.* 376.

SUBSCRIPTION.**TO CAPITAL STOCK OF CORPORATION.**

1. *Contract construed, as to limited liability for amount subscribed.* See CORPORATIONS, 7.

2. *Limitation—when the statute begins to run—as to subscription payable in installments, on call.* See LIMITATIONS, 1, 2.

SURETY.**ON OFFICIAL BOND.**

Of his liability. See OFFICIAL BONDS, 1, 2, 3.

TAXATION AND TAX TITLES.**OF THE ASSESSMENT.**

1. *By whom made—and herein, of the power of review.* The assessor, alone, is the person or officer who can, in the first instance, determine the value of property for taxation; and no appeal to or right of review by any tribunal, other than the boards mentioned in the statute, is given. *People ex rel. Gerstkemper v. Lots in Ashley*, 297.

TAXATION AND TAX TITLES. OF THE ASSESSMENT. *Continued.*

2. The courts are powerless to revise an assessment or change or set aside a valuation of property made by an assessor, or by the boards authorized by law to review the same, where the assessment has been honestly made upon property subject to taxation, and upon the proper basis. Such assessment can not be impeached or set aside except for fraud or want of jurisdiction of the property. The courts will not interfere on the ground that the assessor erred in judgment by assessing too high or too low, if he acted honestly. *People ex rel. Gerst kemper v. Lots in Ashley*, 297.

3. Where a deputy assessor views the property, and sets down, in the proper column, its fair cash value as determined by him, it can make no difference that he supposed his work was subject to review by some one else, or that his assessment would be reduced one-third in amount; and his statement to the owners that such reduction would be made, affords no valid reason for their not appearing before the board of review and seeking a reduction of the valuation. *Ibid.* 297.

4. A county board is powerless to change the assessments returned according to law, except upon complaint that they are too high or too low, or by way of equalization under the statute. *Ibid.* 297.

5. *Inequality in assessment—as affecting the validity of the tax.* The law requires all taxable property to be assessed at its fair cash value, and the fact that some property may be assessed at only one-third that value will not render invalid an assessment of other property at its cash value. *Ibid.* 297.

6. So the omission of the assessor to assess the property of some persons liable to taxation, or the assessing of the property of some at less than its fair cash value and that of others at its cash value, while it may cause the tax-payer whose property is assessed at its cash value to bear an undue portion of the public burden, it will not affect the validity of his tax. *Ibid.* 297.

7. *Fraud in assessment—to invalidate tax.* The fraud which will authorize the courts to interfere and declare an assessment void, is such as affects the assessment itself. The statement of the assessor, to those assessed, that his valuation will be reduced to one-third of the fair cash valuation made by him, is not such a fraud as will authorize the court to interfere, and will not excuse the tax-payer from seeking redress before the proper board of review. *Ibid.* 297.

ASSESSMENT AND TAXATION OF RAILROAD PROPERTY.

8. *Rule of uniformity, as applicable to railroad property assessed by the State Board of Equalization, and other property assessed by the local assessors.* The State Board of Equalization having made an assessment of certain railroad property at about its cash value, the local officer extended the tax upon the basis of such valuation. The other property in the same locality was assessed for the same year, by

TAXATION AND TAX TITLES.**ASSESSMENT AND TAXATION OF RAILROAD PROPERTY. *Continued.***

the local assessor, at only about one-third its cash value. The railroad company sought to enjoin the collection of so much of the tax as resulted from the excess in valuation of its property over that of individuals. The contention of the company was, that by reason of the unequal valuation it would be required to pay a tax largely in excess, in comparing actual values, of individuals in the same locality, and this in violation of the rule of uniformity prescribed in the constitution. But the relief sought was denied. *Illinois and St. Louis Railroad and Coal Co. et al. v. Stookey*, 358.

9. *Former decisions.* The railroad company invoked in support of its contention in that regard, the rule announced in *Bureau County v. Chicago, Burlington and Quincy Railroad Co.* 44 Ill. 229, and *Chicago and Northwestern Railway Co. v. Boone County*, id. 240, that where the property belonging to individuals in a particular locality has been assessed at less than its cash value, the constitutional rule of uniformity forbids that the property of a railroad company situate in the same locality should be assessed upon any greater per cent of its value than that of individuals. Without inquiring whether the constitutional provision in question was properly applied in those cases, it was considered that it has no application to the circumstances of the present case. *Ibid.* 358.

10. *Assessments by the local assessor and by the State board—as to the respective rates.* In this case the property of the individuals was assessed by the local assessor, and that of the railroad company by the State Board of Equalization, each acting under a statute not in conflict with the constitution, and which required that all property should be assessed at its fair cash value. The mere fact that the local assessor did not comply with the law in that regard could not operate to invalidate the assessment of the State board, which was in compliance with the law. *Ibid.* 358.

11. *Assessment by the State board—whether subject to review.* Moreover, an assessment of railroad property for taxation by the State Board of Equalization is conclusive, except where fraud has intervened. *Ibid.* 358.

12. *Valuation of railroad property, as returned by the company—whether binding on the State board.* The State Board of Equalization, in the assessment of railroads, is not bound by the valuation fixed upon its road, etc., by the company, and a slight error in judgment on the part of the board, in the valuation of such property, there being no fraud or corruption shown, affords no ground for enjoining any part of the taxes levied on such valuation. *Ibid.* 358.

TOWNSHIP ORGANIZATION.**UNDER CONSTITUTION OF 1848.**

Special legislation—county court—management of county affairs.
See **SPECIAL LEGISLATION, 1.**

TRIAL BY JURY. See **JURY, 1, 2, 3.****TRUSTS AND TRUSTEES.****RELATION OF TRUST AND CONFIDENCE.**

1. *When a trust will arise—abuse of trust and confidence by an agent.* Where a confidential agent is employed to examine title to land, with a view of correcting defects therein, and to assist his employer in acquiring title to adjacent land, and, as such agent, is intrusted with his principal's abstracts of title, and receives information to aid him in procuring the title, if he, while so acting, acquires the title in his own name, in violation of his duty, he will, in equity, be held to hold such title in trust for his principal. *Vallette v. Tedens et al.* 607.

2. Persons engaged in the business of making abstracts of title, occupy a relation of confidence toward those employing them, second, only, in the sacredness of its nature, to that between an attorney and his client, and should be held to a strict responsibility in the exercise of the trust and confidence reposed in them. Any abuse of such trust and confidence should receive an emphatic rebuke. *Ibid.* 607.

3. A party may voluntarily assume a confidential relation toward another, and if he does so, he can not thereafter do any act for his own gain at the expense of such relation. *Allen et al. v. Jackson et al.* 567.

4. So when a person obtains the legal title to property by virtue of a confidential relation and influence, under such circumstances that he ought not, according to the rules of equity and good conscience, to hold and enjoy the beneficial interests of the property, a court of equity, in order to administer complete justice between the parties, will raise a trust by construction, and fasten it upon his conscience, and convert him into a trustee of the legal title, and order him to hold it, or to execute the trust in such manner as to protect the rights of the real party in interest. *Ibid.* 567.

5. A corporation acquired a tract of land subject to an incumbrance thereon, which it was to discharge, and laid the same out into lots, which it sold, making warranty deeds therefor. On bill to enforce the incumbrance, the lot owners applied to one who was a director and president of the corporation, and asked him if the company would protect them, and what steps they should take, and he assured them that the company would protect their rights, and directed them to pay no attention to the suit. Relying on this assurance, no defence was made and no steps taken to pay off the incumbrance, and the property was

TRUSTS AND TRUSTEES.**RELATION OF TRUST AND CONFIDENCE. *Continued.***

sold, and such officer acquired the legal title to the lots, and claimed the same adversely to the rights of the prior purchasers thereof: *Held*, that by directing such purchasers to make no defence, but to trust to the company, such officer voluntarily assumed a confidential relation, and incapacitated himself from becoming the purchaser of the lots at the foreclosure sale to the detriment of the prior purchasers from the company, and that he took the property in the same situation it was when he assured the lot purchasers that their rights should be protected. *Allen et al. v. Jackson et al.* 567.

CONVEYANCE IN TRUST.

6. *And in whom the legal title will vest.* A land patent from the United States to A and B, trustees for C and her children, C being a married woman and wife of B, conveys only an estate to A and B in trust for C and her children born and thereafter to be born. *Dean et al. v. Long et al.* 447.

7. A conveyance in trust, or to the use of another, which prescribes no duties to be performed by the trustee, but leaves him a mere passive title, vests the legal title in the *cestui que trust*. But this rule does not apply to a conveyance to one in trust for a married woman and minor children incapable of contracting in regard to their property. In such case the legal estate will not vest in the *cestui que trust*, but will vest in the trustee for the *cestui que trust*. *Ibid.* 447.

PRIVATE CHARITABLE CORPORATION.

8. *As, an educational institution.* A private charitable corporation formed for the purpose of receiving donations for the establishment and maintenance of a normal university, and the education of teachers for the common schools, will be a trustee of the property acquired by it, to be held and administered for the special purpose of the charter. In such case the donors of its property, as well as those to be educated, will have an interest in the faithful execution of the trust, and the courts will not allow an abuse of the trust or the diversion of the trust property to other purposes than those to which it has been devoted. *Board of Education v. Bakewell*, 339.

RESULTING TRUST.

9. *When it arises.* Where a party furnishes another with money to enter land for the former, and the latter enters the same in his own name, and afterwards transfers the certificate of purchase to the former, or makes him a deed, which is lost, and the patent is issued to the latter, a resulting trust will arise in favor of the party who furnished the money, and to his grantees, and the court will decree a conveyance of the land accordingly. *Bush et al. v. Stanley et al.* 406.

10. *By whom it may be asserted—after discharge in bankruptcy.* The fact that a party who has conveyed property by warranty deed has

TRUSTS AND TRUSTEES. RESULTING TRUST. *Continued.*

been discharged as a bankrupt, will not prevent him from maintaining a bill to perfect the title thereto, by establishing a resulting trust in his favor, as against adverse claims, and enjoining an action of ejectment by the holder of the legal title against those claiming under his deed. *Bush et al. v. Stanley et al.* 406.

11. *Adjusting equities—the trustee excluded.* A decree on a bill to establish and enforce a resulting trust, found that S., one of the parties, owned the land, subject to a mortgage to C.: *Held*, that the defendant (the trustee) had no interest in adjusting the equities and priorities between S. and C. *Ibid.* 406.

UNIFORMITY IN TAXATION. See TAXATION AND TAX TITLES, 5, 6, 8, 9.**USURY.****PENALTY FOR NON-PAYMENT AT MATURITY.**

1. *As to attorney's fee—whether within the statute.* Section 6, of chapter 74, of the Revised Statutes, entitled "Interest," after fixing the rate of interest which might be contracted for, at eight per cent, provides: "And all contracts executed after this act shall take effect, which shall provide for interest or compensation at a greater rate than herein specified, on account of non-payment at maturity, shall be deemed usurious, and only the principal sum due thereon shall be recoverable." *Barton v. Farmers and Merchants' National Bank*, 352.

2. Under this statute, all penalties for non-payment at maturity, whether as additional interest or as compensation for the use of money, in excess of the legal rate of interest, are prohibited; but an agreement in a promissory note that, in the event the note is not paid at maturity, and shall be placed in the hands of an attorney for collection, the maker will pay a specified sum as attorney's fee, the sum so stipulated to be paid not being interest or compensation on account of the non-payment of the principal sum and interest reserved, but intended only as indemnity to the creditor against actual loss from the failure of the debtor to keep his agreement, is not within the inhibition of the statute, notwithstanding the amount stipulated to be paid as such attorney's fee, in addition to the rate of interest reserved, would exceed the legal rate allowed to be contracted for as interest. *Ibid.* 352.

3. *Consideration of promise to pay attorney's fee.* In such case, the making of the loan or extending the credit would be a good consideration for the promise by the debtor of indemnity in the way of an agreement to pay an attorney's fee, as was provided. *Ibid.* 352.

VACATING STREET. See STREETS, 1, 2.

VARIANCE.**AS TO ALLEGATIONS AND PROOFS.**

1. *Generally.* See PLEADING AND EVIDENCE, 1, 2, 3.

NAME IN INDICTMENT.

2. *As to middle initial in name of person to whom accused is charged to have been married—in indictment for bigamy.* See CRIMINAL LAW, 5.

VENDOR'S LIEN. See LIENS, 2, 3, 4.**VENUE.****IN CRIMINAL CASE.**

1. *Of proof of the venue.* See CRIMINAL LAW, 4.

CHANGE OF VENUE.

2. *Refusal—ground of application obviated.* See PRACTICE IN THE SUPREME COURT, 2.

VERDICT.**FORM OF THE VERDICT.**

1. *On trial for murder—direction in respect thereto.* On the trial of several persons upon the charge of murder, the trial court instructed the jury as to the form of their verdict, as follows: "If all the defendants are found guilty, the form of the verdict will be, 'We, the jury, find the defendants guilty of murder, in manner and form as charged in the indictment,' and fix the penalty." "If all are found not guilty, the form of the verdict will be, 'We, the jury, find the defendants not guilty.'" And correspondingly, in case part were found guilty and part not guilty. The verdict was, guilty of murder. It was objected by the defendants, that under this instruction, the jury were obliged to find the defendants guilty or not guilty of murder, whereas the jury were entitled to find that the offence was a lower grade of homicide than murder, if the evidence so warranted. But the objection was not well taken. If the defendants desired to have the jury differently instructed, they should have prepared an instruction accordingly. *Spies et al. v. People*, 1.

VOLUNTARY ASSIGNMENTS.**BY NON-RESIDENT DEBTOR.**

1. *For the benefit of creditors—whether enforceable in this State.* See INSOLVENT DEBTORS, 1, 2.
2. *As to preferences among creditors.* Same title, 3, 4.

WILLS.**ELECTING TO TAKE UNDER A WILL.**

1. *As an estoppel to question any part of the will.* It is a well settled rule in equity, that a person, by taking any beneficial interest under a will, is thereby held to confirm and ratify every other part of the will,—or, in other words, he shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat or in any way prevent the full effect and operation of any part of the will. *Gorham et al. v. Dodge*, 528.

2. So where a testatrix bequeathed to her daughter \$700, and devised her homestead to her son, and the daughter accepted the bequest to her, it was held, that the latter was thereby estopped from enforcing the specific performance of a parol agreement of the testatrix to give the homestead to the daughter on the death of the former. Having elected to take under the will, the daughter could not set up a claim which would defeat the devise to the son. *Ibid.* 528.

CONTEST OF WILL.

3. *Time within which to exhibit a bill to contest.* Section 2 of chapter 148 of the Revised Statutes, entitled "Wills," provides for the *ex parte* proof of wills on the testimony of the attesting witnesses, which corresponds with the probate, in England, "in common form," while the subsequent proceeding by bill in equity, under section 7, to contest the validity of the will, is analogous to the probate "in solemn form," by the executor, upon being cited in by the next of kin. Both stages differ from the English probates in extending to the real as well as personal estate. *Luther et al. v. Luther et al.* 558.

4. The provision in the statute that if any person interested shall, within three years after the probate of any will, by bill in chancery, contest the validity of the same, etc., is not a limitation law. The filing of the bill within three years is a jurisdictional fact, and is necessary to put the court in motion. The court has no power to entertain such a bill which has been filed after the three years have expired, except in the cases of disability named in the statute. *Ibid.* 558.

WITNESSES.**COMPETENCY.**

1. *Party as against heirs.* The deposition of a party complainant, taken after the death of a defendant, in a bill filed to set aside a deed, and for rents, etc., is incompetent to be read as evidence as against such deceased party's heirs. *Dean et al. v. Long et al.* 447.

IMPEACHMENT OF WITNESS.

2. *Based upon reputation for truth.* Before a witness can swear that he will not believe a man under oath, he must first swear that he knows that man's reputation for truth and veracity among his neigh-

WITNESSES. IMPEACHMENT OF WITNESS. *Continued.*

bors, and that such reputation is bad. The unwillingness to believe under oath must follow from and be based upon two facts,—first, the fact that the witness knows the reputation for truth and veracity among the man's neighbors; second, the fact that such reputation is bad. As the reputation must be bad before it can be known to be bad, the most material fact to be proved is that such reputation is bad. What a man's reputation is, is a fact to be proved just as any other fact. *Spies et al. v. People*, 1.

TAXING FEES.

3. *Limiting the number of witnesses—in proceedings under Eminent Domain act.* See COSTS, 3.

4. *Time of application to limit number of witnesses whose fees may be taxed—and how far discretionary.* Same title, 4, 5.

WORDS AND PHRASES.**"AND HER CHILDREN."**

Conveyance to grantee "and her children," construed to include after-born children. See CONVEYANCES, 2.

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